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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Services and Facilities of Southern California Edison Company and San Diego Gas and Electric Company Associated with the San Onofre Nuclear Generating Station Units 2 and 3.	Investigation 12-10-013 (Filed October 25, 2012)
And Related Matters.	Application 13-01-016 Application 13-03-005 Application 13-03-013 Application 13-03-014

BRIEF OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) IN SUPPORT OF THE SONGS SETTLEMENT AGREEMENT, AS ADOPTED BY THE COMMISSION IN D.14-11-040

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Pursuant to the Joint Ruling of Assigned Commissioner and Administrative Law Judge Reopening Record, Imposing *Ex Parte* Contact Ban, Consolidating Advice Letters, and Setting Briefing Schedule (May 9, 2016) ("Joint Ruling"), Southern California Edison Company ("SCE") respectfully submits this brief in support of the Amended Settlement Agreement ("Settlement") regarding the allocation of costs associated with the failed steam generators and closure of the San Onofre Nuclear Generating Station ("SONGS").

I. Executive Summary

On November 20, 2014, the Commission unanimously found that the Settlement was reasonable, lawful, and in the public interest. Consistent with the Commission's policy in favor of settlements, the Commission found that the Settlement reflected a reasonable compromise that was within the range of possible outcomes if this matter had been fully litigated, that it was negotiated at arms'-length, that it received broad support, that it was consistent with Commission precedent, and that it complied with law.

Those conclusions were correct when the Commission made them, and they are even more strongly supported today. The Settlement provides that customers do not pay for the replacement steam generators ("RSG(s)") from the day after they failed, nor do they pay for the additional costs SCE incurred to inspect and attempt to repair the RSGs in 2012. Customers pay for the power they used and for other reasonable investments in SONGS assets (other than the RSGs) made over the almost 30 year operating life of SONGS. When it approved the Settlement, the Commission estimated that, after SCE's shareholders bore the cost of the RSGs, the expenses incurred in 2012 to respond to the outage, and a reduced rate of return on other SONGS investments, the Settlement would result in customers paying $2.5 billion in rates over

ten years in present value dollars,[1] an outcome the Commission found was reasonable.[2] Favorable developments since the Commission's decision have reduced customer costs by $500 million in present value dollars. This reduction mainly reflects recoveries from Nuclear Electric Insurance Limited ("NEIL"), which insured SONGS, and from the nuclear decommissioning trusts. Customers' costs may be reduced further by recoveries from Mitsubishi,[3] the designer and manufacturer of the defective RSGs, and by proceeds of sales of nuclear fuel.[4]

In its decision approving the Settlement, the Commission found that the Settlement was a reasonable compromise of the parties' litigation positions in the OII. The Commission observed that the amount customers will pay in rates under the Settlement is far closer to the amount they would have paid had the Commission accepted the positions recommended in the litigation by the Office of Ratepayer Advocates ("ORA") and The Utility Reform Network ("TURN") than if the Commission had accepted the positions recommended by SCE and SDG&E. For example,

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[1] All figures in this brief are approximate and reflect SCE's share unless otherwise stated. The Commission and the Settling Parties referred to the present value of the amounts to be paid in future rates as the "Present Value of Revenue Requirement," or "PVRR." In other words, PVRR refers to the funds to be recovered in rates over time, expressed in constant dollars by application of a discount rate. The Settling Parties agreed that PVRR was the appropriate way to value the parties' litigation positions and the settlement, as it reflected the amounts that customers would pay in rates under the settlement and litigation scenarios. Capitalized terms used herein have the meanings set forth in the Settlement.

[2] D.14-11-040 at 2, 2014 Cal. PUC LEXIS 554 (Nov. 20, 2014). The decision refers to the PVRR of $3.3 billion for the customers of both SCE and San Diego Gas & Electric Company ("SDG&E") combined. SCE's share of that amount was estimated at that time at $2.5 billion, PVRR. SCE-56. As explained in the text, that estimate has now been reduced to $2 billion. SCE and SDG&E together are referred to as the "Utilities."

[3] "Mitsubishi" refers to Mitsubishi Heavy Industries, Ltd. and related entities such as Mitsubishi Nuclear Energy Systems and Mitsubishi Heavy Industries America Inc.

[4] Response of Southern California Edison Company (U 338-E) to Joint Ruling of Assigned Commissioner and Administrative Law Judge Reopening Record, Imposing *Ex Parte* Contact Ban, Consolidating Advice Letters, and Setting Briefing Schedule at 13 (Table 2) (June 2, 2016) ("Summary of Settlement Agreement Implementation").

TURN's witness advocated for a disallowance of the RSG costs from the day after the outage began; for recovery by SCE of all other SONGS investments (albeit with a reduced or zero rate of return); for recovery of all operations and maintenance ("O&M") costs except the incremental expense to respond to the outage; and for sharing the recoveries from third parties. ORA's recommendations were similar. The Settlement is similar to TURN's and ORA's positions with respect to each of these elements. TURN's and ORA's litigation positions would have resulted in customers paying $2 billion and $1.9 billion in present value dollars, respectively, which is much closer to the Settlement amount of $2.5 billion than to SCE's litigation position that customers should pay $3.7 billion. Both TURN and ORA witnesses testified that the Settlement represented a very favorable outcome for customers. As TURN's witness testified, the Settlement "is quite close to our original litigation position and that of ORA."[5]

Had this litigation continued, there was a significant risk that the outcome could have been more costly for customers. Absent a finding that SCE acted imprudently in its management of the RSG project, there would have been no basis to disallow the RSG costs. SCE, however, would have presented a strong case that it acted prudently. The failure of the RSGs was due to errors deeply embedded in Mitsubishi's proprietary computer codes that were unknown to SCE, and no reasonable customer would have detected those errors. In addition, SCE argued that all SONGS assets should remain in rate base until June 1, 2013, and that 23% of SONGS assets that remain in use after the shutdown should continue to be in rate base thereafter. For the remaining SONGS assets, SCE recommended a five-year amortization period with a debt rate of return. These positions were well-supported by precedent and the record, and they would have increased costs to customers significantly compared to the Settlement.

[5] TURN, Marcus, Tr. p. 2679, lines 12-13.

On the other hand, the possibility that a litigated outcome would have been better for customers than the Settlement was remote. Even if the Commission had found that SCE acted imprudently, the most likely remedy would have been a disallowance of a portion of the RSGs—precisely what the Settlement provides. As TURN's witness William Marcus testified, the disallowance of the RSG costs as of February 1, 2012, under the Settlement was essentially a proxy for a finding of imprudence,[6] and the Commission stated that it "tend[ed] to agree" with that view.[7]

A disallowance of other SONGS investments beyond the RSGs would have been, in the Commission's words, an "extreme action."[8] Under basic cost-of-service ratemaking principles, utilities recover their reasonable investments, regardless of whether an asset lasts longer or shorter than its anticipated life. When a utility asset lasts longer than its anticipated life, as many of SCE's assets do, customers continue to receive the benefit of that asset even though utility shareholders no longer earn a profit on their original investment. Conversely, when utility assets are retired earlier than anticipated, customers reimburse the utility for its prudently incurred investments in the assets. The Commission has consistently allowed utilities to recover the remaining investment in prematurely-retired plants. No party has cited a single precedent in which the Commission has denied such recovery, and SCE is unaware of any.

The March 26, 2013 meeting in Warsaw between Stephen Pickett, then an SCE executive, and Michael Peevey, then President of the Commission, does not affect the reasonableness of the Settlement. Nothing about the Warsaw meeting changes the fact that the

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[6] *Id*. at p. 2709, lines 9-13.

[7] D.14-11-040 at 114-15.

[8] *Id.* at 114 ("Although it is possible we could take such extreme action given the right set of circumstances, there is little indication yet that such a conclusion is probable here.").

allocation of costs under the Settlement is favorable to customers in light of the parties' litigation positions and the risks of further litigation. TURN and ORA agreed. After SCE reported the Warsaw meeting, and in response to the Petition for Modification filed by the Alliance for Nuclear Responsibility ("A4NR"), TURN stated that the Settlement represented "a favorable outcome for ratepayers,"[9] and ORA admitted that "rescinding the settlement would not necessarily result in a better outcome for ratepayers."[10]

Nor did the Warsaw meeting affect the integrity of the process by which the Settlement was negotiated and approved. It is undisputed that President Peevey and Mr. Pickett did not reach any agreement in the Warsaw meeting, and neither man participated in the settlement negotiations. Instead, the Settlement was the product of an arms'-length negotiation between SCE and SDG&E, on the one hand, and TURN and ORA, on the other. Both before and after SCE reported the Warsaw meeting, TURN and ORA affirmed that they negotiated the Settlement independently and in good faith. As TURN has acknowledged, President Peevey told TURN about the Warsaw meeting a few days after TURN signed the Settlement, yet TURN continued to support the Settlement.[11] TURN's actions make clear that it believed the Warsaw meeting was irrelevant to the process by which the Settlement was negotiated and to the reasonableness of the Settlement itself.

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[9] Response of The Utility Reform Network to the Amended Petition for Modification of Decision 14-11-040 by Alliance for Nuclear Responsibility at 3 (June 24, 2015) ("TURN Response").

[10] Office of Ratepayer Advocates Petition for Modification of D.14-11-040 at 2 (Aug. 11, 2015) ("ORA Petition").

[11] Response of Southern California Edison Company (U 338-E) to the Alliance for Nuclear Responsibility's Petition for Modification of D.14-11-040 (June 2, 2015) ("SCE's Response to A4NR Petition") at Attachment (Declaration of Henry Weissmann, attaching TURN Press Release dated April 17, 2015).

The negotiation of the Settlement was based on the parties' litigation positions and the record, not anything said in Warsaw. The Phase 2 testimony of TURN witness William Marcus identifies the same cost categories as are addressed in the Settlement, and his recommendations for how those costs should be allocated are quite similar to the Settlement. Indeed, Mr. Marcus's testimony is a much closer match to the Settlement than the notes of the Warsaw meeting. The suggestion that the parties might have negotiated a different Settlement had they known about the Warsaw meeting is not credible. TURN correctly acknowledges that, had the Warsaw meeting been disclosed, "it is not clear whether the outcome for ratepayers [in the Settlement] would have been materially different."[12]

In D.15-12-016, the Commission imposed a penalty of $16.7 million on SCE in connection with its failure to timely report eight ex parte communications, principally the Warsaw meeting, and related representations to the Commission. That penalty is a complete remedy for those issues. None of those eight communications undermines the Commission's approval of the Settlement.

As there is no valid basis to revisit the Commission's conclusion that the Settlement is reasonable, lawful, and in the public interest, rescinding the decision approving the Settlement would call into question the reliability of the Commission's decisions, would unwind the $1.6 billion in rate relief that customers have already received under the Settlement, and would expose customers to the risk of a worse outcome. The Commission should decline to revisit its sound decision approving the Settlement.

[12] TURN Response at 3.

II. Background

A. Key Events Leading Up to the Permanent Retirement of SONGS

SONGS Units 2 and 3 began operating in 1983 and 1984, respectively. The Commission approved the original construction of Units 2 and 3, and subsequently approved additional SONGS-related investments and ongoing O&M costs in periodic General Rate Cases throughout the years. In so doing, the Commission deemed these costs reasonable and eligible for rate recovery from customers.[13] Units 2 and 3 operated under licenses issued by the Nuclear Regulatory Commission ("NRC") that were scheduled to expire in 2022.

Over time, Units 2 and 3 experienced degradation of their original steam generators, as was common throughout the nuclear industry. To extend the useful life of SONGS, SCE proposed the Steam Generator Replacement Project ("SGRP"), which involved the removal and disposal of the original steam generators and the purchase and installation of the RSGs. In 2005, the Commission authorized the SGRP; found that SCE's estimate of $680 million (in 2004 dollars) was reasonable; and stated that the Commission did not plan to conduct an after-the-fact reasonableness review of the SGRP unless the final project costs exceeded this estimate (after adjustment for inflation).[14] After a competitive solicitation and bidding process, SCE engaged Mitsubishi to design and manufacture the new steam generators. Units 2 and 3 returned to operation with new steam generators on April 18, 2010, and February 18, 2011, respectively.

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[13] *See, e.g.*, D.04-07-022, 204 Cal. PUC LEXIS 325 (July 8, 2004) (2003 GRC); D.06-05-016, 2006 Cal. PUC LEXIS 189 (May 11, 2006) (2006 GRC); D.09-03-025, 2009 Cal. PUC LEXIS 165 (Mar. 12, 2009) (2009 GRC); D.12-11-051, 2012 WL 6641483 (Cal. P.U.C. Nov. 29, 2012) (2012 GRC).

[14] D.05-12-040, 2005 Cal. PUC LEXIS 539 (Dec. 15, 2005). The $680 million threshold was later revised to $670.8 million in D.11-05-035, 2011 Cal. PUC LEXIS 289 (May 26, 2011), due to a change in the scope of the SGRP.

On January 10, 2012, SONGS Unit 2 was removed from service for a scheduled refueling and maintenance outage. On January 31, 2012, SCE operators initiated a controlled rapid shutdown of Unit 3 after sensors detected a reactor coolant leak in the steam generators. SCE immediately notified NRC resident inspectors, who were present on-site, and established response teams to evaluate the condition of the RSGs and determine potential corrective actions. After thorough inspections of Unit 3, SCE determined that one steam generator tube had leaked and over 300 additional tubes had unexpected wear from rubbing against each other. Due to the leak in Unit 3, SCE also conducted further inspections of Unit 2, which also exhibited accelerated tube wear, although not as extensive as the wear in Unit 3. SCE looked to Mitsubishi to propose and justify a repair that would return the RSGs to their warranted condition.

In March 2012, the NRC sent an augmented inspection team to SONGS. The NRC team found that SCE had responded to the leak "in a manner that protected public health and safety and all safety systems performed their functions to support the safe shutdown and cooldown of the plant."[15] The NRC team determined that the tube wear was caused by excessive vibration resulting from a condition called "fluid elastic instability." This condition arises from a combination of thermal-hydraulic conditions (steam velocity and moisture content of the steam), and ineffective tube supports. The NRC eventually determined that Mitsubishi's in-house, proprietary modeling software ("FIT-III") had failed to accurately model the thermal-hydraulic conditions at SONGS. Despite Mitsubishi having repeatedly assured SCE that FIT-III had been validated for the SONGS design and would allow Mitsubishi to prevent fluid-elastic instability,

[15] NRC Augmented Inspection Team Report 05000361/2012007 and 05000362/2012007 at i (July 18, 2012) ("NRC Augmented Inspection Team Report"), available at http://pbadupws.nrc.gov/docs/ML1218/ML12188A748.pdf.

errors embedded in the computer code resulted in a gross under-prediction of thermal-hydraulic conditions and the potential for fluid-elastic instability.[16]

On March 23, 2012, SCE informed the NRC by letter that it would not restart Unit 2 until the tube wear in Unit 3 was understood and the company had confidence that Unit 2 could be safely restarted. Similar commitments were made for Unit 3. The NRC issued a Confirmatory Action Letter ("CAL") to SCE on March 27, 2012, which confirmed the commitments made in SCE's letter and required NRC concurrence before SCE could restart Unit 2 or Unit 3. When it became clear to SCE that Unit 3 could not be restarted in the near future, the company took steps to preserve the asset and protect it from corrosion by placing it in lay-up mode while Mitsubishi was working on a plan to permanently repair the unit.

On October 3, 2012, SCE submitted a response to the CAL, proposing to restart Unit 2 at 70% power for a five-month operating cycle. SCE's response included support for its conclusion that operating at 70% power would avoid fluid-elastic instability. Meanwhile, SCE continued to press Mitsubishi to propose a viable solution for a long-term repair of both units that would allow them to operate at 100% power. Because SCE was diligently engaged in regulatory processes with the NRC to restart Unit 2, and was continuing to press Mitsubishi for a repair, SCE had to maintain the unit in a ready-to-restart condition, including maintaining staff needed to operate the plant and to perform related security functions.

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[16] *See, e.g.*, Review of Lessons Learned from the San Onofre Steam Generator Tube Degradation Event at 25 (Mar. 6, 2015) ("Review of Lessons Learned"), available at http://www.nrc.gov/docs/ML1501/ML15015A419.pdf; NRC Confirmatory Action Letter Response Inspection 05000361/2012009 and 05000362/2012009 at 21, 28 (Sept. 20, 2013) ("NRC Confirmatory Action Letter"), available at http://www.nrc.gov/docs/ML1326/ML13263A271.pdf.

On May 13, 2013, the NRC's Atomic Safety and Licensing Board ("ASLB") characterized the partial restart plan as an "experiment" and ruled that the plan required SCE to apply to amend the SONGS operating license.[17] The ASLB's decision created the potential for significant delay of the NRC's decision on restart, with an uncertain outcome.

On June 7, 2013, SCE announced its decision to permanently retire SONGS. SCE made this decision based on an economic analysis of the costs of continuing to maintain the plant in a state of readiness for restart compared to the benefits of SONGS operation if restart were permitted. This analysis took into consideration the uncertainty and delay triggered by the ASLB's decision; Mitsubishi's failure to propose a viable permanent repair plan for either unit, despite the 16 months that had passed since the initial leak; and the extensive costs that SCE was continuously incurring to maintain Unit 2 in a ready-to-restart condition. SCE also gave weight to the need to develop long-term plans for replacement of SONGS as a generating resource. Based on these considerations, SCE concluded that a shutdown of SONGS was the prudent course of action.

B. Procedural History of the OII (I.12-10-013)

On October 25, 2012, the Commission voted to adopt an Order Instituting Investigation ("OII") into the extended outages at SONGS. In a Scoping Memo dated January 28, 2013, and an email ruling dated May 6, 2013, the OII was divided into four separate phases, as follows:

- Phase 1: The reasonableness of SONGS-related costs in 2012.
- Phase 1A: The method for determining which 2012 costs were replacement power due to the SONGS outage.

[17] ASLB Memorandum and Order (May 13, 2013), available at http://pbadupws.nrc.gov/docs/ML1313/ML13133A323.pdf.

- Phase 2: Whether any provisional reductions to SCE's rate base were warranted due to the outages.

- Phase 3: A prudence review to determine the cause of the outages, allocation of responsibility, and reasonableness of the SGRP expenses.

- Phase 4: If needed, whether SCE's 2013 revenue requirement should be adjusted to account for lower-than-forecasted SONGS expenses.

The ALJs and the Assigned Commissioner held evidentiary hearings on Phases 1, 1A, and 2. On March 15, 2013, SCE filed A.13-03-005, seeking Commission approval to include the recorded capital costs of the SGRP permanently in rates. The application, which was consolidated into the OII and would have been heard as part of Phase 3, demonstrated that the recorded costs of the SGRP were less than the Commission-approved reasonableness threshold of $670.8 million. Once deflated to 2004 dollars using the Handy-Whitman index and CPUC-approved escalation factors, the total cost of the SGRP amounted to $612.1 million.

On November 19, 2013, the ALJs issued a Proposed Decision ("PD") on Phases 1 and 1A issues. The PD recommended disallowing a portion of 2012 SONGS costs based on its conclusions that SCE should have known that Unit 2 would not return to service in 2012, and should have avoided certain costs by placing Unit 2 in "preservation mode" and postponing capital expenditures. However, the PD would have allowed SCE to present additional evidence in Phase 3 regarding the reasonableness of its actions to maintain staff throughout 2012, and to adjust any disallowance accordingly. The PD also adopted a method for calculating market-related power costs and directed the Utilities to serve exhibits in Phase 3 setting forth their replacement power costs using that methodology.

In its Comments on the PD, and at an all-party meeting before the Commission, SCE strenuously argued that the PD's proposed disallowance was not reasonable based on the record evidence in the OII. In particular, SCE argued that the ALJs' conclusion that SCE should have

known that Unit 2 would not restart in 2012 was devoid of factual support, and that the record on this issue was not well developed due to procedural rulings that appeared to limit the scope of Phase 1. The Commission never adopted the PD.

In Phase 2 of the OII, SCE proposed ratemaking based on the shutdown of SONGS. SCE contended that most SONGS assets could be classified in one of two groups: 1) assets that were no longer operational following SCE's decision to retire SONGS (approximately 77% of SCE's total net investment in SONGS); and 2) assets that remain in service and are still necessary, despite SONGS's retirement, for SCE to maintain plant security, comply with existing regulatory requirements regarding environmental safety, and prepare for decommissioning (approximately 23% of SCE's net SONGS investment). SCE recommended that the net investment in retired assets be removed from authorized rate base as of the date of SONGS's retirement and amortized over a five-year period at a reduced rate of return equal to the cost of debt. SCE recommended that assets that remain necessary for SONGS operations remain in authorized rate base, earning a full rate of return, until each asset is retired or reaches the end of its depreciation life. SCE also recommended that it be permitted to recover the balance of its capital investments in Construction Work in Progress ("CWIP"), Materials and Supplies ("M&S"), and nuclear fuel, although SCE recommended a reduced rate of return for various components of these investments, such as CWIP projects that were cancelled as a result of the outage. Finally, SCE recommended that it be permitted to recover all of its recorded O&M costs, which had declined below authorized levels due to the shutdown.

On March 20, 2014, the Utilities, TURN, and ORA notified the parties on the OII service list of a settlement conference[18] to describe and discuss the terms of a proposed agreement. The conference was held on March 27, 2014. Following the settlement conference, the Utilities, ORA, and TURN signed the settlement agreement.

The settlement is discussed in detail in Section IV of this brief and in SCE's Response to Joint Ruling. In broad strokes, the settlement agreement provided that:

- The Utilities would remove the net investment associated with the SGRP from rate base as of the first day following the tube leak—February 1, 2012—and would not recover this investment in rates.
- The Utilities would forego rate recovery of incremental steam generator inspection and repair costs ("SGIR") that exceed the provisionally authorized revenue requirement for O&M in 2012. Otherwise, the Utilities would collect the provisionally authorized O&M amount for 2012 and all recorded O&M for 2013 that does not exceed the authorized amount.
- SCE would recover the cost of replacement power provided to customers.
- SCE would remove the remaining net investment in SONGS (excluding the SGRP) from its authorized rate base as of February 1, 2012. Although SCE would recover this investment, it would do so at a significantly reduced rate of return and over a ten-year amortization period.

[18] *See* Rule 12.1 of the Commission's Rules of Practice and Procedure.

- SCE would recover its net investment in M&S and nuclear fuel, at a reduced rate of return and over a ten-year amortization period. To the extent SCE sells M&S or nuclear fuel, 95% of the net proceeds would be credited back to customers.
- SCE would be permitted to recover the full balance of CWIP, except the portion that was associated with the SGRP, but would accept a reduced Allowance for Funds Used During Construction ("AFUDC").
- SCE and customers would share the proceeds of any net recovery (i.e., recovery net of legal costs) from Mitsubishi or NEIL.

On April 3, 2014, the Utilities, TURN, and ORA signed an agreement adding the Coalition of California Utility Employees ("CUE") and Friends of the Earth ("FOE") to the settlement agreement.

On April 3, 2014, the Settling Parties filed a Joint Motion for Adoption of Settlement Agreement. In support of the settlement, the Settling Parties presented a comparison of the PVRR between the settlement and the parties' litigation positions. The parties projected that the settlement would yield a PVRR for SCE's customers that was estimated at $2.5 billion, which is $1.2 billion less than the PVRR SCE was seeking in this proceeding.

On May 14, 2014, ALJs Dudney and Darling held an evidentiary hearing regarding the meaning of the settlement agreement and any contested issues of fact arising thereunder.[19]

[19] *See* Administrative Law Judges' Ruling Setting Hearing and Requiring Supplemental Information on Joint Motion for Adoption of Settlement at 4 (Apr. 24, 2014).

Subsequently, on May, 22, 2014, the Settling Parties submitted Joint Reply Comments in support of the Commission's approval of the settlement under Rule 12.[20]

On September 5, 2014, the assigned Commissioner and ALJs issued a ruling requesting modifications to the settlement agreement.[21] This ruling proposed certain modifications to be made by the Settling Parties before settlement approval pursuant to Rule 12 could be recommended.[22] Most prominent among the requested modifications, the September 5, 2014 Ruling requested modifications to the formulas for sharing recoveries from third parties.[23] The ruling requested the Settling Parties to agree that customers and shareholders would each receive 50% of recoveries from Mitsubishi (after deducting litigation costs), instead of a graduated sharing established in the original settlement. The Ruling further requested the Settling Parties to agree that customers would receive 95% of recoveries from NEIL under the "outage policy" (after deducting litigation costs), instead of 82.5% under the original settlement.[24] Additionally, the September 5, 2014 Ruling: 1) proposed that the Utilities would establish a greenhouse gas research program at the University of California and provide shareholder funding for the

[20] Joint Reply Comments of Southern California Edison Company (U 338-E), San Diego Gas & Electric Company (U 902-E), The Utility Reform Network, the Office of Ratepayer Advocates, Friends of the Earth, and the Coalition of California Utility Employees in Support of Motion for Adoption of Settlement Agreement at 4-8 (May 22, 2014) ("Joint Reply Comments in Support of Motion to Adopt Settlement Agreement").

[21] *See* Assigned Commissioner and Administrative Law Judges' Ruling Requesting Settling Parties to Adopt Modifications to Proposed Settlement Agreement (Sept. 5, 2014) ("September 5, 2014 Ruling").

[22] *Id.* at 2.

[23] *Id.* at 6-7.

[24] *Id.* at 7.

program at a rate of $5 million per year for five years[25]; 2) required the sharing (50/50) between shareholders and customers of savings in the cost of financing the regulatory assets through debt only; and 3) modified Commission oversight of settlement implementation.[26]

The Settling Parties noticed and held a telephonic settlement conference on September 23, 2014, to explain the amendments to the proposed settlement in response to the September 5, 2014 Ruling. On September 24, 2014, the Settling Parties filed and served an Amended and Restated Settlement Agreement, which included the modifications requested in the September 5, 2014 Ruling.[27]

On November 25, 2014, the Commission issued a decision unanimously approving the Settlement.[28] The Commission noted that "[t]he primary result of the settlement is ratepayer refunds and credits of approximately $1.45 billion."[29] The Commission found the Settlement "consistent with the law and precedent,"[30] meeting the requirements of Rule 12.1(d).[31] It emphasized the extent of negotiations between the Settling Parties, noting that "[i]n a settlement, each party undertakes an analysis of its own interests in light of its organizational goals" and that

[25] *Id.* at 8-10. The ruling requested that SCE fund $4 million per year and SDG&E fund $1 million per year.

[26] *Id.* at. 7-8, 11-12.

[27] D.14-11-040 at 21.

[28] D.14-11-040.

[29] *Id.* at 2 (referring to amounts to be credited by SCE and SDG&E). In fact, SCE alone has credited customers $1.6 billion under the Settlement. Response of Southern California Edison Company (U 388-E) to Joint Ruling of Assigned Commissioner and Administrative Law Judge Reopening Record, Imposing *Ex Parte* Contact Ban, Consolidating Advice Letters, and Setting Brief Schedule at 10 (Table 1) (June 2, 2016) ("Summary of Settlement Agreement Implementation").

[30] D.14-11-040 at 85.

[31] *Id.* at 135.

it is the "Commission's duty to test the result against the Rule 12.1 criteria."[32] The Commission went on to find that the Settlement was both "consistent with the law" and "does not contravene any statute or Commission decision or rule."[33] The Commission also found the Settlement reasonable in light of the whole record, noting that the "Amended Agreement clearly represents a compromise between the litigation positions of the diverse settling parties and falls within the range of possible outcomes of the consolidated proceedings, if litigated further."[34] Finally, the Commission found the Settlement in the public interest, noting the amendments to the settlement agreement "made few, but significant, changes that are distinctly in the public's interest."[35]

As a result of the Settlement, the Commission never issued a proposed decision on the Phase 2 issues in the OII. Additionally, the Phase 3 evidentiary hearings became unnecessary.

C. Developments Since the Commission Approved the Settlement

1. Late-Filed Ex Parte Notice

On February 9, 2015, SCE filed a late-filed Notice of Ex Parte Communication, which described a March 26, 2013 meeting between SCE's then-Executive Vice President of External Relations, Stephen Pickett, and then-President Michael Peevey in Warsaw, Poland, while both were attending a conference ("Warsaw meeting").[36] As described in SCE's notice, during this conversation, President Peevey expressed his thoughts on the structure of a possible resolution to the SONGS OII, and Mr. Pickett believed he expressed a brief reaction to one of President

[32] *Id.* at 83.

[33] *Id.* at 83, 85.

[34] *Id.* at 109.

[35] *Id.*

[36] Southern California Edison Company's (U 338-E) Late-filed Notice of Ex Parte Communication at 1 (Feb. 9, 2015) ("Late-filed Notice").

Peevey's remarks.[37] (The Commission later found that Mr. Pickett communicated his opinion about what a settlement agreement should look like.)[38] Mr. Pickett took handwritten notes, which President Peevey retained.[39] While the communication itself was entirely lawful, the Commission's rules require a report to be filed when a party engaged in a substantive communication to a decision maker. Although SCE concluded in 2013 that the communication was one-way, SCE subsequently concluded, based on additional information received from Mr. Pickett in early 2015, that an ex parte notice should be filed. On April 13, 2015, SCE filed a supplement to its late-filed notice of ex parte communication, attaching a copy of the notes taken in the Warsaw meeting.

ALJ Darling issued a ruling on April 14, 2015, directing SCE to provide additional information relating to the late-filed notice of ex parte communications.[40] SCE responded on April 29, 2015, producing 28 documents, a log of privileged documents, and summaries of communications between SCE and Commission decision makers.[41] ALJ Darling issued another

[37] *Id.*

[38] D.15-12-016 at 29, 2015 Cal. PUC LEXIS 758 (Dec. 3, 2015).

[39] Late-filed Notice at 1.

[40] Administrative Law Judges' Ruling Directing Southern California Edison Company to Provide Additional Information Related to Late-filed Notices of *Ex Parte* Communications at 5-6 (Apr. 14, 2015).

[41] *See* Southern California Edison Company's (U 338-E) Response to Administrative Law Judges' Ruling at 1 (Apr. 29, 2015). SCE filed a supplement to this response on October 20, 2015, providing additional responsive documents as a result of further unrelated document collection and review efforts. *See* Supplement to Response of Southern California Edison Company (U 338-E) to Administrative Law Judges' Ruling (Oct. 20, 2015).

ruling on June 26, 2015, directing SCE to provide clarification and further information.[42] SCE responded on July 3, 2015.[43]

On August 5, 2015, ALJ Darling issued a ruling finding that SCE violated the ex parte communication reporting requirement in Rule 8.4 of the Commission's Rules of Practice and Procedure with respect to ten communications, and ordering SCE to show cause as to why it should not also be found in violation of Rule 1.1 and subject to sanctions.[44] SCE filed its response on August 20, 2015.[45]

On December 8, 2015, the Commission issued D.15-12-016, in which it affirmed the ALJ's ruling finding eight violations of Rule 8.4 and two violations of Rule 1.1.[46] The Commission imposed a penalty of $16,740,000 and directed SCE to develop an internal tracking system and public log of all non-public communications that relate to the SONGS OII and consolidated proceedings where SCE and CPUC decision makers are present.[47] SCE implemented the latter directive through the development of an electronic log on SCE's intranet that is to be updated by any SCE employee who is present or participates in a non-public,

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[42] Email Ruling Requesting Supplemental Information from SCE by July 3, 2015 (June 26, 2015).

[43] Southern California Edison Company's (U 338-E) Response to Administrative Law Judges' June 26, 2015, Ruling (July 3, 2015).

[44] Amended Administrative Law Judge's Ruling Finding Violations of Rule 8.4, Requiring Reporting of Ex Parte Communications, and Ordering Southern California Edison Company to Show Cause Why It Should Not Also Be Found in Violation of Rule 1.1 and Be Subject to Sanctions for All Rule Violations (Aug. 5, 2015) ("ALJ Ruling on Sanctions").

[45] Response of Southern California Edison Company (U 338-E) to Amended Administrative Law Judges' Ruling Finding Violations of Rule 8.4, Requiring Reporting of Ex Parte Communications, and Ordering Southern California Edison Company to Show Cause (Aug. 20, 2015).

[46] D.15-12-016 at 2.

[47] *Id.* at 61-62.

individual communication with any CPUC commissioner, advisor, or decision maker regarding the SONGS OII and consolidated proceedings.[48] An SCE employee must make an electronic log entry noting the proceeding and information regarding the communication, including the subject, participants, and whether an ex parte notice was filed.[49] The log entry is saved in SCE's internal tracking system and, if related to the SONGS OII, is reviewed by an SCE attorney and posted to SCE's public website by the SCE Energy Regulation Compliance Program.[50]

On December 15, 2015, the University of California, Los Angeles ("UCLA") filed a Late-Filed Notice of Ex Parte Communications, which contained copies of email communications and described additional oral communications between representatives of the UCLA Institute of the Environment and Sustainability and Commission officials and staff. The communications concerned funding for greenhouse gas emissions research and took place between April and September 2014.

2. Petitions for Modification

On April 27, 2015, A4NR filed a petition for modification of D.14-11-040, in which it asked the Commission to rescind the decision approving the Settlement based on the Warsaw meeting.[51] SCE filed a response to the A4NR petition on June 2, 2015, in which it pointed out

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[48] Advice Letter 3373-E at 1-2 (Mar. 1, 2016).

[49] *Id.* at 2-3. The log entry includes: principal attorney assigned to the proceeding; subject of the communication; date the communication took place; location of the communication; CPUC decision maker present during or participating in the communication; other CPUC participants present during or participating in the communication not classified as a decision maker; SCE participants present during or participating in the communication; length of the communication; whether written materials were used in the communication; whether an ex parte notice was filed; and explanation if an ex parte notice was not filed.

[50] *Id.* at 3.

[51] Alliance for Nuclear Responsibility's Petition for Modification of D.14-11-040 (Apr. 27, 2015). A4NR filed an amendment to its petition on May 26, 2015.

that A4NR had failed to demonstrate any way in which the Warsaw meeting undermined the Commission's finding that the settlement was reasonable, lawful, and in the public interest.[52]

TURN filed a response in support of A4NR's petition for modification on June 24, 2015.[53] TURN stated that it negotiated the settlement in good faith[54] and decided to support the settlement "based on its own independently developed litigation positions, a review of the positions put forth by all active parties, and an assessment of potential outcomes based on past Commission decisions …."[55] TURN further stated that "the settlement represented a favorable outcome for ratepayers"[56] and acknowledged that, had the Warsaw meeting been disclosed, "it is not clear whether the outcome for ratepayers [in the settlement] would have been materially different."[57] Without addressing whether the Settlement continues to meet the standards for approval set forth in Rule 12.1, TURN nevertheless recommended that the Commission rescind its decision approving the Settlement based on TURN's concern that the report of the Warsaw meeting created a "public perception" that the settlement process was "tainted" and the outcome "unfair"—a "perception" that TURN pointedly did not endorse.[58]

SCE filed a supplemental response to A4NR's petition on June 25, 2015.[59] SCE explained why TURN's views about "public perception" do not warrant rescinding the decision

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[52] SCE's Response to A4NR Petition at 5-6.

[53] TURN Response.

[54] *Id.* at 2.

[55] *Id.* at 3.

[56] *Id.*

[57] *Id.*, p. 3.

[58] *Id.*, pp. 3-4.

[59]Supplemental Response of Southern California Edison Company (U 338-E) to the Alliance for Nuclear Responsibility's Petition for Modification of D.14-11-040 in Light of the Response of (footnote continued)

approving the Settlement.[60] A4NR filed a reply in support of its petition on July 7, 2015.[61] A4NR's petition remains pending.

On August 11, 2015, ORA filed a petition for modification of D.14-11-040, asking the Commission to rescind its decision approving the Settlement. ORA acknowledged that "rescinding the settlement would not necessarily result in a better outcome for ratepayers," and that litigation of the OII "would essentially give Edison a second chance to get a better outcome for itself …."[62] Nevertheless, in light of the penalties proposed in the ALJ's ruling with respect to ex parte reporting violations, which ORA felt were inadequate, ORA contended that a litigated outcome would better serve the interests of the public.[63]

SCE filed its response to ORA's petition on September 10, 2015.[64] SCE pointed out that findings in D.14-11-040 that the Settlement is reasonable, lawful, and in the public interest remained valid, and that ORA's own statement that the Settlement is favorable for customers reinforced the Commission's conclusions. SCE also noted that ORA failed to present any evidence that the Warsaw meeting undermined the settlement negotiations, and further contended that ORA's desire to extract a larger financial penalty for the ex parte reporting issues does not justify rescinding the approval of the Settlement.

The Utility Reform Network (June 25, 2015) ("SCE's Supplemental Response to A4NR Petition").

[60] *Id.* at 6-8.

[61] Alliance for Nuclear Responsibility's Reply to Responses to Its Amended Petition for Modification of D.14-11-040 (July 7, 2015).

[62] ORA Petition at 2.

[63] *Id.* at 2-3.

[64] Response of Southern California Edison Company (U 338-E) to the Office of Ratepayer Advocates' Petition for Modification of D.14-11-040 (Sept. 10, 2015) ("SCE's Response to ORA Petition").

ORA's petition likewise remains pending before the Commission.

3. Settlement Implementation Developments

Since the Commission's approval of Settlement in D.14-11-040, SCE has taken steps to reduce the amount SCE customers will pay in future rates through recoveries and offsets not included in the estimates prepared at the time the Settlement was approved. These reductions, which include a settlement with NEIL, withdrawals from the nuclear decommissioning trust as approved by the Commission, and recoveries from the Department of Energy ("DOE"), are described in SCE's June 2, 2016 Summary of Settlement Agreement Implementation.[65]

The PVRR of the Settlement for SCE's customers is currently estimated at $2 billion, which is approximately $500 million less than the PVRR estimated when the Commission approved the Settlement as reasonable and in the public interest. The amounts customers will pay in rates under the Settlement may be further reduced by recoveries from Mitsubishi and the proceeds of sales of nuclear fuel. SCE has provided or will provide refunds and rate reductions of nearly $1.6 billion under the Settlement, again before any recoveries from Mitsubishi or nuclear fuel sales.[66]

D. Summary of the Joint Ruling

On May 9, 2016, Commissioner Sandoval and ALJ Bushey issued the Joint Ruling reopening the record to review the Settlement against Commission Rule 12.1(d) "in light of the Commission's December 2015 Decision fining [SCE] for failing to disclose ex parte communications relevant to this proceeding."[67] The ruling continues:

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[65] Summary of Settlement Agreement Implementation.

[66] *Id.* at 1, 10 (Table 1), 13 (Table 2).

[67] Joint Ruling at 1.

> However, we are also mindful of TURN's and ORA's estimate that the actual Settlement Agreement obtained between $780 million and $1.06 billion more for ratepayers than the terms of the ex parte discussions. As a result of the approved Settlement Agreement, for example, ratepayers are receiving nearly $400 million from the settled insurance claim with Nuclear Electric Insurance Limited. Moreover, a litigated outcome is uncertain.[68]

The Joint Ruling directs SCE to file a summary of the settlement agreement, including a status report on its implementation. SCE and SDG&E filed such reports on June 2, 2016. The Joint Ruling further directs all parties to file and serve briefs on July 7, 2016, addressing whether the Settlement meets Commission standards for approving settlements.

III. Standard of Review

The Commission has long articulated a policy in favor of settlement: "We have acknowledged in prior decisions the strong public policy in California favoring settlements and the propriety of settlement in utility matters."[69] At the same time, the Commission recognizes that it has an independent duty to review a proposed settlement agreement and to approve it only if a "settlement is reasonable in light of the whole record, consistent with law, and in the public interest."[70] This standard, which is codified in Rule 12.1(d), must be shown by a preponderance of the evidence.[71]

In reviewing settlement agreements, the Commission considers "whether the settlement reflects the risks, expense, complexity, and likely duration of further litigation; whether it fairly and reasonably resolves the disputed issues and conserves public and private resources; and

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[68] *Id*. at 4.

[69] D.93-03-021, 48 CPUC 2d 352, *33 (1993); D.91-05-029, 40 CPUC 2d 301, 326 (1991).

[70] *See* D.09-10-017, 2009 WL 3374041 (Cal. P.U.C. Oct. 15, 2009) (applying Rule 12.1(d) in approving a settlement); D.88-12-083, 30 CPUC 2d 189, 221-23 (1988).

[71] D.13-04-012 at 3, 2013 WL 1628605 (Cal. P.U.C. Apr. 4, 2013).

whether the agreed-upon terms fall clearly within the range of possible outcomes had the parties fully litigated the dispute."[72] In addition to these factors, the Commission considers whether the settlement agreement is the result of arms'-length negotiations and whether the parties were adequately represented in determining whether a settlement meets the Rule 12.1(d) standard.[73]

While the Commission may consider individual settlement provisions, in light of strong public policy favoring settlements, it should not base its "conclusion on whether any single provision is the optimal result."[74] The Commission typically will not request changes to the terms of a settlement negotiated by the parties. As the Commission has noted:

> If our goal truly is to encourage settlements or stipulations, then we must resist the temptation to alter results of a good faith negotiation process unless the public will be harmed by the agreement.[75]

As such, the Commission's task is to determine whether a proposed settlement, viewed as a whole, complies with Rule 12.1(d). If the Commission finds that a settlement as presented does not meet those standards, it may request that the settling parties modify the terms of the

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[72] D.14-11-040 at 21-22 (citing D.96-05-070, 66 CPUC 2d 314 (1996)).

[73] The Commission has frequently articulated that, in reviewing a proposed settlement, it will consider litigation risk, expense, and likely duration; whether the settlement negotiations were conducted at arms'-length negotiations; whether the major issues were addressed; and whether the representation of interests was adequate. *See* D.88-12-083; D.14-12-024, 2014 WL 7146188 (Cal. P.U.C. Dec. 4, 2014); D.14-03-007, 2014 Cal. PUC LEXIS 140 (Mar. 13, 2014); D.12-09-018, 2012 Cal. PUC LEXIS 408 (Sept. 13, 2012); D.12-03-015, 2012 Cal. PUC LEXIS 122 (Mar. 8, 2012); D.11-12-053, 2011 Cal. PUC LEXIS 585 (Dec. 15, 2011); D.11-07-002, 2011 Cal. PUC LEXIS 377 (July 14, 2011); D.10-12-035, 2010 Cal. PUC LEXIS 467 (Dec. 16, 2010).

[74] D.11-05-018 at 16, 290 P.U.R.4th 1 (Cal. P.U.C. May 5, 2011).

[75] D.93-03-021, 48 CPUC 2d 352, at *33; *see also* D.10-12-051, 2010 Cal. PUC LEXIS 556, at *56 (Dec. 10, 2010) (noting "[t]his strong public policy favoring settlements also weighs in favor of the Commission resistance to altering the results of the negotiation process").

settlement,[76] as was done in this case. However, the Commission may not unilaterally change the terms of the settlement; it must give the parties the opportunity to accept or reject any proposed changes.[77]

IV. The Settlement Is Reasonable, Lawful, and in the Public Interest

The Commission approved the Settlement in a thorough, 136-page decision, in which it concluded that the Settlement "will result in just and reasonable rates, is consistent with the law, reasonable in light of the whole record, and in the public interest."[78] Those conclusions were correct when made and remain correct today. In fact, the Settlement is even *more* favorable to customers than the Settling Parties predicted when they asked the Commission to approve the agreement, principally due to recoveries from NEIL.[79] The Commission's decision should be left in place and the Settlement should be allowed to serve its intended purpose of replacing the uncertainty of the OII with a fair and balanced resolution.

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[76] Rule 12.4(c) of the Commission's Rules of Practice and Procedure (in reviewing settlement, Commission may "[p]ropose alternative terms to the parties to the settlement which are acceptable to the Commission and allow the parties reasonable time within which to elect to accept such terms or to request other relief").

[77] D.16-01-023 at 51, 327 P.U.R.4th 488 (Cal. P.U.C. 2016) (finding Commissioner's proposed alternative terms to a settlement acceptable to the Commission and permitting comments pursuant to Rule 12.4 as to whether parties to the settlement accepted such terms); D.14-12-040 at 35, 2014 WL 7339277 (Cal. P.U.C. Dec. 18, 2014) (approving a settlement with Commission modifications and providing "the Settling Parties 10 days … to either accept the modification [the Commission] propose[d] in this decision or request other relief"); D.14-12-024 at 14 (proposing modifications to a settlement and providing the settling parties 15 days "to either accept the modifications we propose in this decision or request other relief"); D.98-12-084, 84 CPUC 2d 517 (1998) (approving a modified all party settlement agreement and noting, "[s]hould the parties fail to timely ratify the modifications herein, the proposed settlement agreement is rejected").

[78] D.14-11-040 at 7.

[79] *Id.*

A. The Settlement Is Reasonable in Light of the Whole Record

The Settlement reflects a reasonable and principled compromise between utility and customer interests. The Settlement precludes SCE from recovering in rates the entire remaining unrecovered capital investment in the SGRP as of February 1, 2012, which amounts to $597 million. The Settlement also requires SCE to forego rate recovery of $99 million that SCE spent to investigate the steam generator damage after the leak was discovered in 2012 ("Incremental Inspection and Repair Costs" under the Settlement). And, the Settlement provides for the amortization of the remaining investment at SONGS generally over ten years at a greatly reduced rate of return.

For their part, customers pay for replacement power and for non-SGRP investments. Customers do not pay for the failed equipment (the RSGs),[80] but do pay for power they consumed, offset in substantial part by 95% of net recoveries from NEIL. They also pay for reasonable investments made on their behalf, although, as noted, over an extended amortization period and at a reduced rate of return. Customers also receive 50% of net recoveries from Mitsubishi.

This allocation of costs reflects a compromise of the parties' litigation positions that is close to the outcomes recommended by TURN and ORA, two of the most experienced and sophisticated parties who appear before the Commission. TURN's witness William Marcus served testimony in Phase 2 of the OII that closely tracked the structure of the settlement and recommended ratemaking that was similar to the settlement in most respects. For example, Mr. Marcus stated that, if the Commission were to find SCE acted imprudently in connection with

[80] The Settlement authorizes the Utilities to retain amounts collected in rates for the SGRP while they were in service (prior to February 1, 2012).

the SGRP, the proper remedy was a disallowance of the remaining investment in the SGRP as of February 1, 2012; that SCE should in any case be allowed to recover its non-SGRP investment in full, albeit over ten years and with either a zero return or, alternatively, a reduced return; that customers should pay for replacement power from the date SONGS was taken out of rate base; and that customers and shareholders should share recoveries from Mitsubishi and NEIL.[81] As Mr. Marcus testified at the evidentiary hearing on the settlement, the Settlement implements the overall outcome that TURN and ORA recommended in the OII.[82]

ORA's witnesses likewise testified that the remedy for any finding of imprudence should be a disallowance of the remaining investment in the SGRP as of February 1, 2012 (or later); that all non-SGRP investment should remain in rate base until November 1, 2012, and thereafter SCE should be allowed to recover 75% of its non-SGRP investment; and that customers should pay for replacement power from the date SONGS was taken out of rate base.

Although TURN and ORA attempted to back away from the Settlement last year, they have never disavowed their statements that the Settlement is beneficial to customers when compared to their litigation positions and the possible outcomes of a fully litigated proceeding. On the contrary, after SCE reported the Warsaw meeting and in response to A4NR's petition for modification, TURN reiterated that the Settlement represented "a favorable outcome for ratepayers,"[83] and ORA admitted that "rescinding the settlement would not necessarily result in a

[81] TURN-15, pages 2-3, 12-13.

[82] TURN, Marcus, Tr. p. 2679, lines 12-13 ("The settlement is quite close to our original litigation position and that of ORA.").

[83] TURN Response at 3.

better outcome for ratepayers."[84] TURN's and ORA's change of heart about the Settlement does not justify rescinding the Commission's decision approving it.[85]

Indeed, the Settlement is far closer to the outcomes recommended by TURN and ORA in the litigation than to SCE's litigation position. SCE contended that it should recover all of its investments, including the SGRP; that all assets should remain in rate base until the permanent shut-down decision was announced in June 2013; and that some assets should continue to earn a full return while others should earn a debt return over an accelerated amortization period.[86] Had the settlement not been reached, SCE would have demonstrated in Phase 3 that its management of the SGRP was prudent. SCE nevertheless agreed to the settlement, which disallows approximately $700 million in capital costs and expenses related to the RSGs. Plainly, SCE's acceptance of this outcome represented an enormous departure from its litigation position and the most favorable outcome on the RSG costs that SCE's opponents could reasonably have achieved in the litigation.

As shown in Table 1, below, the rates authorized by the settlement agreement are considerably lower than the rates SCE would have collected if the Commission had accepted SCE's recommendations in the OII. As set forth in SCE's Summary of Settlement Agreement Implementation, the PVRR of the Settlement was originally estimated at $2.5 billion, compared to SCE's litigation position, which would have yielded a higher PVRR to be recovered from

[84] ORA Petition at 2.

[85] *See, e.g.*, D.99-01-033, 84 CPUC 2d 707 (1999); D.96-05-037, 1996 Cal. PUC LEXIS 652 (May 8, 1996); *see also* SCE's Response to ORA Petition at 4-5.

[86] Brief of Southern California Edison Company (U388-E) on Phase 2 Issues at 25 (Nov. 22, 2013) ("SCE's Phase 2 Opening Brief").

customers of $3.7 billion.[87] (Both figures are now lower due to recoveries from NEIL and DOE and withdrawals from the decommissioning trust.) SCE's litigation position, moreover, accepted that most SONGS assets were no longer in use, should be removed from rate base, and should receive a reduced rate of return. In other words, SCE's litigation position acknowledged that, as a result of the permanent shut down of SONGS, SCE's shareholders would bear significant losses—losses that are not captured in the comparison of the Settlement to SCE's litigation position.[88] For their part, TURN and ORA estimated the PVRR of their litigation positions at $2.1 billion and $1.9 billion, respectively[89]—much closer to the settlement PVRR than was SCE's litigation position. Given that "a litigated outcome is uncertain"[90] and that customers faced the risk of significantly higher rates, the Settlement is eminently fair and in the public interest.

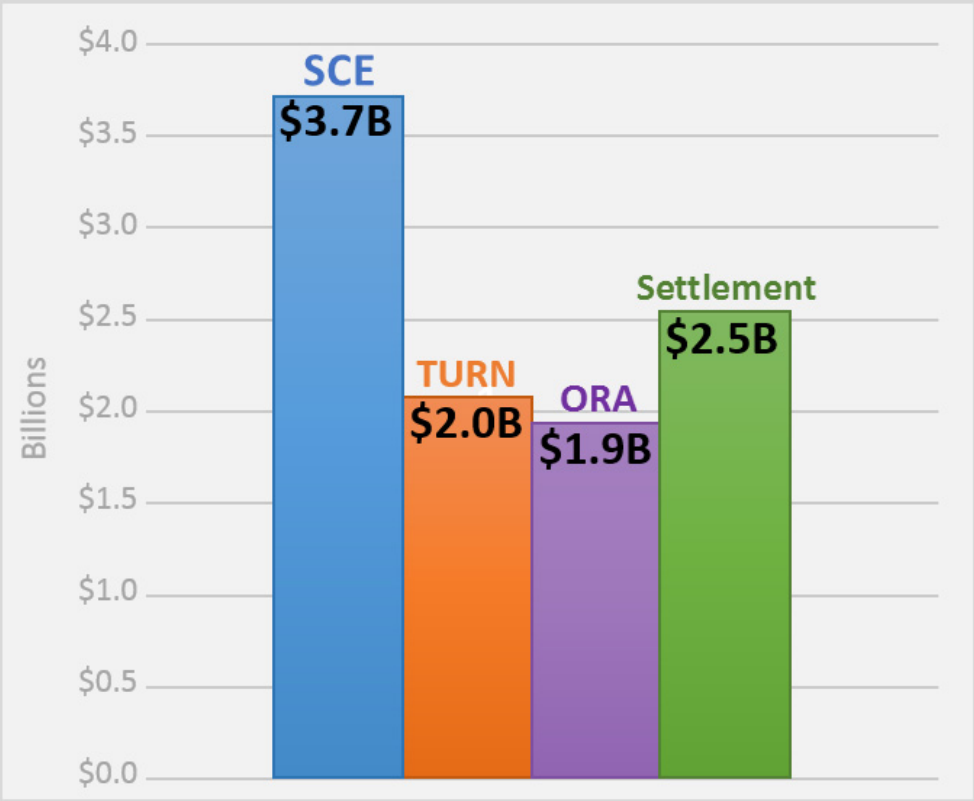
[87] Summary of Settlement Agreement Implementation at 13 (Table 2).

[88] The PVRR of the estimated return that SCE would have earned on SONGS investments had SONGS continued to operate was $639 million. If SCE's litigation position in Phase 2 of the OII was accepted, SCE would have received a return that translated to a PVRR of $316 million. In other words, as its litigation position, SCE accepted a loss of future earnings of approximately $320 million as a result of the closure of SONGS. The Settlement reduced the return yet further.

[89] SCE-56 (Corrected).

[90] Joint Ruling at 4.

Table 1: Comparison of Settlement and Litigation Positions
(PVRR; $ billions)



See SCE-56 (Corrected). SCE has since updated its estimated PVRR of the Settlement to $2.036 billion.
See Summary of Settlement Agreement Implementation, June 2, 2016, at 13 (Table 2).

The overall fairness of the Settlement can also be demonstrated by reference to the key terms of another settlement agreement that the Commission deemed reasonable in the past—the settlement resolving cost recovery of SONGS Unit 1 when that unit was retired. Although settlements are not binding precedent, the Commission approved the SONGS 1 settlement and held that its terms were "reasonable, lawful, and in the public interest."[91] The SONGS 1 settlement was significantly more favorable to SCE shareholders than the Settlement pertaining to Units 2 and 3. The SONGS 1 settlement allowed SCE to recover its entire remaining

[91] D.92-08-036, 45 CPUC 2d 274 (1992).

investment in SONGS 1, including its investments in CWIP, materials and supplies, and nuclear fuel. SCE was allowed to amortize these investments over a four-year period. With the exception of the nuclear fuel investment, which would receive a rate of return equal to the "nuclear fuel inventory interest rate" during the amortization period, SCE was entitled to earn a rate of return on this investment equal to its embedded cost of debt—8.98% at the time of the settlement. The SONGS 1 settlement also allowed SCE to collect all of its recorded O&M expenses. By contrast, the Settlement disallows a portion of net plant investment ($597 million for the SGRP); disallows $99 million in recorded O&M; and uses both a longer amortization period (ten years) and a much lower rate of return (2.62%) ($200 million less, PVRR, than the return SCE recommended as its litigation position in the OII).

The Settlement builds on an extensive record in the OII, which was litigated for a year and a half before the Settling Parties signed the settlement agreement. The ALJs held three separate evidentiary hearings (spanning a total of 12 days) and received thousands of pages of prepared testimony from more than 35 witnesses, many of whom were cross-examined at the hearings. After each of the three evidentiary hearings, the Utilities, TURN, ORA, and various other parties submitted lengthy opening and reply briefs setting forth their respective positions. Discovery on all issues was permitted, and the Utilities also responded to hundreds of data requests from intervenor parties; SCE alone answered nearly a thousand. SCE also web-posted many meeting notes from Mitsubishi-SCE design sessions.[92] There was also a significant record developed around the Settlement itself, as seven witnesses provided written testimony to the Commission regarding the Settlement; the Settling Parties submitted a 46-page brief setting forth the reasons the agreement should be adopted; and the Commission held an evidentiary hearing

[92] D.14-11-040 at 86.

where six witnesses testified about the agreement. The whole record of the OII, which the Commission aptly described as "broad and voluminous,"[93] provides more than adequate information for the Commission to evaluate the reasonableness of the Settlement.

Some opponents of the Settlement have erroneously asserted that the Commission lacked an adequate record to approve the Settlement because Phase 3 of the OII was not litigated and they were unable to test SCE's prudence. The Commission considered and properly rejected that argument in its decision approving the Settlement.[94] A primary benefit of settlement is that it enables the Commission to resolve issues *before* they have been the subject of full discovery, hearings, and decision. If parties were unable to settle disputes without litigating every major issue, it would not be possible for settlements to accomplish their key goals, as articulated by the Commission: "the reduction of litigation expense [and] the conservation of scarce Commission resources."[95] Furthermore, the Rule 12.1(d) criterion that a settlement must be "reasonable in light of the whole record" does not require that the record be completely developed; it merely asks the Commission to determine whether the agreement is reasonable in light of the record that *was* developed, and in light of the possible outcomes of further litigation. The Settlement reflects an outcome that is consistent with the well-developed record of the OII and that falls well within the range of reasonable outcomes had the case been litigated to conclusion.

As noted, the Commission evaluates the reasonableness of a settlement taken as a whole; there is no need to demonstrate that each individual term is reasonable.[96] Although the foregoing

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[93] *Id.* at 87.

[94] *Id*. at 110-15.

[95] *Id*. at 69-70.

[96] *See, e.g.*, D.11-05-018 at 16 ("In assessing settlements we consider individual settlement provisions but, in light of strong public policy favoring settlements, we do not base our
(footnote continued)

analysis is sufficient to demonstrate that the Settlement is reasonable taken as a whole, each major provision of the Settlement is also reasonable in and of itself, as the Commission correctly found in approving the Settlement.[97]

1. Replacement Steam Generator Costs

The Settlement disallows the entire remaining investment in the RSGs starting on February 1, 2012, and all of the O&M that SCE spent in 2012 (above its previously-authorized O&M levels) to investigate the steam generator damage after the leak was discovered. This outcome is the best possible result on RSG costs that customers could have hoped to achieve if the OII had been litigated to completion.

In the OII, the Commission would not have had authority to disallow these costs unless it found SCE to have acted imprudently. The SGRP had been pre-approved as cost-effective by the Commission;[98] was completed within the budget set by the Commission;[99] and had already entered service and begun providing power to customers. Although the Commission could have disallowed RSG costs if it found that SCE had managed the SGRP imprudently, the RSG failure is not a basis for a disallowance in and of itself. To the contrary, the Commission applies a "reasonable manager" standard to prudence reviews of nuclear projects, which holds utilities should not be held strictly liable for errors that occur despite diligent and responsible oversight.[100]

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conclusion on whether any single provision is the optimal result. Rather, we determine whether the settlement as a whole produces a just and reasonable outcome.").

[97] D.14-11-040 at 85-105.

[98] D.05-12-040.

[99] A.13-03-005.

[100] *See, e.g.*, D.87-12-018, 1987 Cal. PUC LEXIS 61, *4 (Dec. 9, 1987) (Describing the standard of review to be applied in the Diablo Canyon prudence review as: "A utility's actions should (footnote continued)

Even SCE's adversaries in the OII acknowledged that the Commission could not have disallowed RSG costs unless SCE were found imprudent in Phase 3. For example, ORA's witness Scott Logan testified during the Phase 2 evidentiary hearing that, if no imprudence finding were made in Phase 3, SCE would be permitted to recover the SGRP investment.[101] A4NR argued that SCE should be permitted full recovery of retired assets such as the RSGs, "unless the Phase 3 decision concludes otherwise" (i.e., unless the Commission were to find that SCE acted imprudently).[102]

If Phase 3 of the OII had been litigated, SCE would have made a strong showing that it managed the SGRP prudently. The defects in the RSGs resulted from mistakes committed by Mitsubishi alone. In a memorandum summarizing the results of its investigation into the SONGS leak (the "Lessons Learned" memorandum), the NRC stated that Mitsubishi's "design models had not appropriately calculated the secondary side flow conditions for the design configuration of the San Onofre steam generators. As a result, there was significantly less margin to fluid-elastic instability in the actual steam generators than anticipated by the models."[103] In other words, Mitsubishi's proprietary computer software failed to accurately

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comport with those a reasonable manager, with appropriate education, training and experience would take in light of the available information and circumstances. What constitutes 'sufficient' education, training and experience should be evaluated in light of the degree of risk that the magnitude of the project and its technology posed to the utility, its ratepayers, and the public."); D.86-10-069, 1986 Cal. PUC LEXIS 666 (Oct. 29, 1986) (Applying the same standard to the prudence review of SONGS 2 and 3 construction and expressly rejecting intervenors' requests to impose disallowances in the absence of an imprudence finding.).

[101] ORA, Logan, Tr. p. 2565, lines 5-9 (Q: "[I]f Edison is found to be prudent after Phase 3, then would the replacement steam generators be put back into rates under your recommendation? A: Yes.").

[102] Alliance for Nuclear Responsibility's Opening Brief on Phase 2 Issues at 15 (Nov. 22, 2013) ("A4NR's Phase 2 Opening Brief").

[103] Review of Lessons Learned at 25; NRC Confirmatory Action Letter at 21, 28.

predict the extent to which the RSGs would experience fluid-elastic instability, which was the phenomenon that resulted in tube vibration and wear and the resulting tube leak.

This design flaw resulted from a technical error deeply embedded in Mitsubishi's computer codes to which SCE did not have access. SCE did not discover this error during the design phase. And SCE could not reasonably have uncovered the error, given that SCE is not a steam generator designer. In fact, SCE hired Mitsubishi precisely because SCE lacked this type of expertise. Mitsubishi specifically and repeatedly assured SCE that its proprietary computer software would accurately predict the secondary side flow conditions in the RSGs and that excessive tube wear would not occur because there was "no potential of fluid elastic [instability]."[104]

Although Mitsubishi made the design errors, NRC regulations made the licensee (SCE) ultimately responsible for the errors from an NRC regulatory perspective, regardless of whether a reasonable utility in SCE's position could have detected and prevented the errors.[105] The NRC informed SCE of this finding in a letter attaching a "Notice of Violation" on December 23, 2013.[106] But this finding was not based on a determination that SCE contributed to, or could have prevented, the design error. If Phase 3 of the OII had been litigated, SCE would have strenuously argued this point and would have presented expert testimony that the Notice of Violation has no relevance to SCE's prudence.

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[104] *See* Summary of Key Issues Raised During Design Oversight Meetings with MHI at 5, 8-10, 13, available at https://www.songscommunity.com/docs/minutes/White_Paper-Summary_of_Key_Issues_Raised_During_Design_Oversight_Meetings_with_MHI_Final.pdf.

[105] Letter from NRC to T. Palmisano re: Notice of Violation (Dec. 23, 2013), available at http://www.nrc.gov/docs/ML1335/ML13357A058.pdf.

[106] *Id.*

In its decision approving the Settlement, the Commission rejected A4NR's contention that the Notice of Violation is "conclusive" evidence that SCE managed the SGRP imprudently.[107] The Commission held that the Notice of Violation is not "determinative" of SCE's prudence in managing the SGRP, and explained that, if the Commission were to consider SCE's prudence in Phase 3, it would conduct a "fact-intensive" analysis that took into consideration whether SCE had followed industry practice in contracting Mitsubishi to perform design functions.[108] If Phase 3 had been litigated, SCE would have made a strong showing that it acted prudently and in accordance with industry practice in relying on Mitsubishi to accurately model the thermal-hydraulic conditions in the RSGs.

Commission rules do not provide that a utility must be held vicariously liable for mistakes made by its vendor. In fact, the Commission has frequently concluded that disallowances should not be imposed based on vendor imprudence alone, as prudence reviews focus on the utility's conduct. One important example is the Commission's 1999 decision reviewing costs associated with outages at the Mohave Generating Station.[109] In that proceeding, SCE conceded that the outages were caused by relays that had been "incorrectly assembled by the manufacturer," and SCE's adversaries took the position that the costs should be disallowed in any event because "it is not good policy for a utility to permit a manufacturer to cause ratepayers to pay the significant expense of a faulty product."[110] The Commission disagreed with the intervenors, explaining that prudence review "is based on the activity of the utility ... not that of a

[107] D.14-11-040 at 79.

[108] *Id.* at 78-80.

[109] D.99-11-022, 1999 Cal. PUC LEXIS 855 (Nov. 4, 1999).

[110] *Id.* at *3, *7.

manufacturer."[111] Because there was no evidence that SCE had acted imprudently, the CPUC declined to impose a disallowance.[112]

The Commission made a similar finding more recently, when SCE sought to recover the costs of an outage at SONGS Unit 2 that was caused by a design and manufacturing defect in a valve.[113] Because SCE's actions leading up to the outage were reasonable, the Commission found that SCE had acted in accordance with the "reasonable manager" standard and allowed SCE to recover the costs incurred as a result of the outage.[114] In the same decision, the Commission also allowed SCE to recover costs associated with several outages at hydro and coal facilities that were caused by the failure of equipment—such as baghouse air pollution control equipment in the coal plant and turbine water wheel buckets in the hydro plant—again because the utility had operated the facilities reasonably.[115]

The Commission's review of the steam generator tube leaks at SONGS Unit 1 also shows the Commission's unwillingness to hold a utility vicariously liable for a vendor's design defects.[116] The tube leaks at SONGS Unit 1 resulted from Westinghouse's "faulty design of the sludge removal system," and the Commission found "no basis in the record to conclude that Edison acted unreasonably in accepting what proved to be a faulty plant design or in its detection and repair of the steam generator failure ...."[117] Because the Commission was concerned that

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[111] *Id.* at *7-*8.

[112] *Id.* at *8.

[113] D.10-07-049, 2010 WL 3064965 (Cal. P.U.C. July 29, 2010).

[114] *Id.* at 21.

[115] *Id.* at 26-27.

[116] *See* D.82-12-055, 10 CPUC 2d 155 (1982).

[117] *Id.* at *29, *31.

SCE had acted imprudently in failing to take timely action against Westinghouse, however, the Commission deferred rate recovery for the repair costs pending resolution of SCE's lawsuit against Westinghouse.[118] Although the Commission ultimately disallowed the costs in connection with this outage, it did so based on a finding that SCE was imprudent for having released Westinghouse of liability for the costs.[119] The history of the SONGS 1 decisions shows that the Commission was unwilling to hold SCE vicariously liable for Westinghouse's design defect; otherwise, there would have been no reason to defer the decision while SCE pursued claims against Westinghouse and no need to base the final disallowance on SCE's own independent imprudent acts.

In light of these precedents, there was considerable risk that a litigated outcome of Phase 3 could have been less favorable to customers than the Settlement's remedy of disallowing the entire net RSG investment as of February 1, 2012. Even if the Commission were to have departed from these precedents, there is no reason to expect that it would have held SCE responsible for 100% of the RSG costs (as the Settlement effectively does) in light of Mitsubishi's role in causing the RSG failures.

In its decision approving the Settlement, the Commission aptly noted that a finding that SCE acted imprudently was far from a foregone conclusion had Phase 3 been litigated:

> In addition, the public actions by NRC and SCE's public web-posting of numerous design review–related documents, have given parties a reasonable opportunity to initiate discovery regarding SCE's SGRP conduct. Yet, Opposing Parties offered nothing---- only speculation and unsupported allegations--- to brace claims that egregious acts by the Utilities, and specific executives, would be uncovered by a Phase 3 record.[120]

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[118] *Id.* at *31.

[119] *See* D.86-09-008, 22 CPUC 2d 14, at *25 (Sept. 4, 1986).

[120] D.14-11-040 at 87-88.

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> [T]he known facts suggest that SCE intends to establish a prima facie case of prudence; establishing the requisite evidence of imprudence at hearing is not ensured and, the effort itself, would likely be quite consuming of time and resources.[121]

The Commission also recognized that some intervenors have misinterpreted NRC documents to find fault in SCE's decision not to seek a license amendment for certain design aspects of the RSGs. As the Commission explained, "[t]he NRC has not made any finding that SCE failed to obtain a required license amendment for the RSG design, even with many opportunities to do so as part of its on-going, and on-site, inspections and oversight of SONGS operations, and the SGRP specifically."[122]

The Commission's comments regarding the NRC's license amendment findings remain true today. SCE sought and obtained all necessary license amendments for the SGRP, and has transparently explained its procedure for evaluating which license amendments were required in a publicly available document.[123] After the Commission published its decision approving the Settlement, the NRC issued its Lessons Learned memorandum, reiterating that the NRC had reviewed SCE's license amendment determination before the steam generators were replaced, and that "[t]he inspection did not identify any issues with [SCE's] ... evaluation."[124] After the tube leak, the NRC again reviewed whether SCE had appropriately evaluated which license

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[121] *Id.* at 113-14.

[122] *Id.* at 113.

[123] Explanation of 50.59-Related Documents Provided to Senator Boxer by Southern California Edison Company (SCE), available at http://www.songscommunity.com/docs/screening/Explanation_of_5059_Documents_Provided_to_Senator_Boxer_by_SCE.pdf.

[124] Review of Lessons Learned at 7.

amendments to seek for the RSGs, and again determined that SCE had "appropriately reviewed" which design aspects of the RSGs required license amendments.[125] On October 2, 2015, NRC staff issued a decision denying a petition from FOE asserting that SCE had failed to request a necessary license amendment for the RSGs. The NRC concluded that "the licensee's conclusion that no license amendment was required was consistent with the requirements of [the relevant NRC regulation,] 10 CFR 50.59."[126]

Although there is no reason to believe that SCE would have been found imprudent if Phase 3 of the OII were litigated, the remedy imposed by the Settlement with respect to the RSGs is the most that the Commission would have imposed if it had found that SCE acted imprudently.[127] As such, it is highly unlikely that a litigated outcome would have produced a better outcome for customers with respect to the RSGs. At the Commission's evidentiary hearing on the settlement, ORA's witness Robert Pocta testified that the Settlement's outcome on the RSGs "is the most optimal result from ORA's perspective that it could achieve in litigation and equivalent to achieving a hundred percent of its litigation position on this issue for ratepayers."[128]

2. Base Plant Costs

The Settlement defines "Base Plant" as "[t]he Net Book Value of all SONGS-related capital investments, except the SGRP, in the Utilities' rate bases." As of February 1, 2012, SCE's share of Base Plant was $622 million (excluding CWIP). The Settlement provides that

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[125] NRC Augmented Inspection Team Report at ii.

[126] NRC's Revised Director's Decision Under 10 CFR 2.206 at 11, available at http://www.nrc.gov/docs/ML1526/ML15267A158.pdf.

[127] D.14-11-040 at 115.

[128] ORA, Pocta, Tr. p. 2673, lines 23-27.

SCE must remove Base Plant from its rate base as of February 1, 2012, and recover the investment at a substantially reduced rate of return and over a ten-year amortization period. This outcome is favorable to customers relative to Commission precedent and the record in the OII.

(a) The General Concept of Base Plant Recovery is Reasonable and Consistent with Precedent and the Record

SCE's recovery of Base Plant is consistent with the "regulatory compact" that spreads the risks and rewards of infrastructure investment between utilities and customers. When SCE builds or adds to generation facilities such as SONGS, SCE's investors typically advance the requisite funds.[129] Under traditional cost-of-service ratemaking principles, these capital investments are added to SCE's rate base once the project is completed and the asset enters service.[130] From this point forward, SCE's customers begin paying rates that cover annual depreciation expenses,[131] which gradually make SCE's investors whole for their original investment over the course of the asset's "estimated useful life."[132] Customers also pay rates sufficient to cover a reasonable rate of return on the undepreciated balance, with that return decreasing over time as the asset is depreciated.[133] Once an asset reaches the end of its estimated useful life, it is expected to be fully depreciated.[134] At this point, the net book value of the asset is zero; SCE's investors have recovered their entire original investment; and the company stops collecting a depreciation expense for this asset and stops earning any return on this asset.[135]

[129] SCE-40 at p. 4, line 15 – p. 5, line 31.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

An asset's "estimated useful life" is an accounting construct governed by generally-accepted accounting principles. The estimated useful life for accounting purposes often does not align with how long an asset remains usable in reality. The length of time that a given asset is actually productive could be longer or shorter than its estimated useful life, depending on the circumstances.[136] But these deviations do not affect the utility's recovery of its capital investments. When an asset remains productive beyond its estimated useful life, customers continue to receive the benefit of that asset even though the asset has no value in rate base and SCE is not earning a return on this asset.[137] Customers continue to pay the asset's operating costs, but do not compensate SCE's shareholders in any way for the original cost of the asset. [138]

For example, SCE witness Russ Worden testified in Phase 2 that "SCE's hydroelectric generation fleet has a number of operating power plants that are well over 100 years old, such as the Santa Ana River Unit 1, which began service in 1899[,]" and "SCE's Big Creek hydroelectric facilities [which] are the largest in the company's fleet."[139] As of November 22, 2013 (the date SCE filed its Phase 2 Opening Brief), SCE had thirty hydroelectric facilities from its original fleet in service, and the average date that those facilities entered service was 1914.[140] These plants' estimated useful life was generally 40 years, so the average hydroelectric facility's original capital investment has been fully depreciated since approximately 1954.[141] Because a fully depreciated asset has no value in rate base, SCE has earned zero return on its shareholders'

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[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] SCE, Worden, Tr. p. 2340, lines 6-9.

[141] *Id.* at lines 9-13.

original investment in these power plants for approximately sixty years. Although customers continue to receive the benefit of these power plants, SCE's investors are no longer compensated for their original investment (although SCE does recover maintenance costs).[142] At the Phase 2 evidentiary hearings, Worden testified that "thousands" of SCE's assets (such as poles) have outlived their estimated useful life and continue to provide service to customers at no profit to investors.[143] He testified further that "hundreds" of power-plant assets would meet this description, including "[l]arge substations" and "large pad-mounted transformers."[144]

On the other side of the coin, when an asset is retired before the end of its estimated useful life, the utility continues to collect depreciation expenses for that asset until its shareholders have been compensated for their original investment.[145] In other words, in exchange for receiving the benefit of assets that are productive even after SCE has been fully compensated for its investment, customers pay the investment cost of assets that are retired early.[146] This arrangement—combined with the principle that utilities can recover only prudently-incurred costs from customers—fairly apportions the risk and reward of building infrastructure between utilities and their customers.

Even when assets are retired early, traditional ratemaking principles inure to the benefit of customers. As Worden explained in his Phase 2 testimony, SCE's access to capital for large construction projects depends on its ability "to provide reasonable assurance that investors will

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[142] *Id.*

[143] SCE, Worden, Tr. p. 2475, lines 13-19.

[144] *Id.* at lines 20-26.

[145] *Id.*

[146] *Id.*

recover their original investment once the project is complete."[147] The Commission's historical policy of allowing full cost recovery for prematurely retired assets (provided the investment was prudently incurred) allows SCE to assure its investors that their capital will be gradually returned, starting when the project enters service.[148] If the Commission were to reverse course on its policy of cost recovery, SCE's ability to attract capital would be undermined and the result would be an overall increase to SCE's cost of capital.[149] An increase to SCE's cost of capital would hinder SCE's ability to build infrastructure for the benefit of customers and could cause rates to rise.

In addition to being equitable, SCE's recovery of Base Plant is consistent with decades of Commission precedent. In fact, SCE is unaware of a single case in which the Commission denied a utility recovery of its remaining capital investment in a facility that was retired before the end of its anticipated useful life. Commission decisions have consistently held that utilities should be allowed to recover their full original investment in prematurely-retired power plants.

In 1985, the Commission authorized Pacific Gas & Electric Company ("PG&E") to recover its remaining capital investment in its nuclear power plant at Humboldt Bay after the plant was retired early due to seismic concerns.[150] The Commission explained that "[i]n the case of a premature retirement, the ratepayer typically still pays for all of the plant's direct cost even

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[147] SCE-40 at p. 7.

[148] *Id.*

[149] SCE, Worden, Tr. p. 2468, line 26 – p. 2469, line 6 ("To the extent the Commission were to adopt a revenue requirement that resulted in deep cuts to the investments we've made, that would have repercussions in the investment community. And the consequences of [those] repercussions [are] that the investors and the bond rating agencies would extract a greater return or premium to invest in California in the future.").

[150] *See* D.85-08-046, 18 CPUC 2d 592 (1985).

though the plant did not operate as long as was expected."[151] In 1985 and 1992, respectively, the Commission authorized SDG&E to recover the undepreciated balance of its original investment in various retired power plants[152] and authorized PG&E to recover its remaining undepreciated balance of Geysers 15, a geothermal plant that was retired before the end of its anticipated useful life due to various operational problems.[153] More recently, in 2011, the Commission authorized Golden State Water Company to recover its remaining base plant investment in the Hill Street water facility, which the utility was forced to retire after receiving repeated water quality violations from the California Department of Public Health.[154] Although ORA challenged other aspects of the utility's ratemaking proposal for the retired water facility, ORA agreed that it should recover the entire remaining undepreciated investment through rates.[155]

SCE's 2012 General Rate Case decision is another recent example of this ratemaking principle. In that decision, the Commission allowed SCE full recovery of its original capital investment in the Mohave Generating Station, a coal plant that SCE retired early due to prohibitive costs and regulatory hurdles related to environmental issues.[156] In the same decision, the Commission allowed SCE to recover its entire remaining capital investment in electromechanical meter equipment that SCE retired early to make way for new meter technology.[157] The Commission likewise allowed PG&E to recover its entire remaining net

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[151] *Id.* at *22.

[152] *See* D.85-12-108, 20 CPUC 2d 115 (1985).

[153] *See* D.92-12-057, 1992 WL 438010, at *3 (Cal. P.U.C. Dec. 16, 1992).

[154] D.11-09-017, 2011 WL 4425407 (Cal. P.U.C. Sept. 8, 2011).

[155] *See id.* at 5.

[156] *See* D.12-11-051 at 45-46.

[157] *See id.* at 649-50; SCE-40 at p. 7, lines 11-16.

investment in its electromechanical metering equipment when PG&E transitioned to modern metering technology before the end of the old equipment's anticipated useful life.[158] After considering precedents on the issue of early retirement, the Commission stated that there was "no issue as to whether or not PG&E and its shareholders should receive rate recovery of the $341 million net plant balance, through depreciation expense or otherwise. Parties agree that PG&E should be allowed to recover that amount."[159]

In its decision approving the Settlement, the Commission correctly referred to a disallowance of Base Plant, even upon a finding of imprudence, as an "extreme action" that does not appear justified in the OII.[160] Indeed, even some of SCE's adversaries in the OII took the position that SCE should be allowed full recovery of its Base Plant investment regardless of the outcome of the prudence review. For example, TURN's litigation position in Phase 2 was that SCE should be permitted to recover its entire remaining Base Plant investment.[161] Despite having opposed other aspects of the settlement, A4NR did not oppose the Settlement's allocation of Base Plant costs to customers.[162]

(b) The Settlement's Base Plant Provisions Are Favorable to Customers Relative to SCE's Litigation Position and Commission Precedent

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[158] D.11-05-018.

[159] *Id.* at 54-55.

[160] D.14-11-040 at 114 ("Although it is possible we could take such extreme action given the right set of circumstances, there is little indication yet that such a conclusion is probable here.")

[161] TURN-15, pages 8-9.

[162] Alliance for Nuclear Responsibility's Opening Comments Opposing the Proposed Joint Settlement Agreement and the Joint Motion for Adoption of the Settlement Agreement (May 7, 2014).

Several aspects of the Settlement's provisions on Base Plant are considerably more favorable to customers than SCE's litigation position on Base Plant. Taken together, SCE's litigation position would have resulted in a PVRR for Base Plant that was $360 million higher than under the Settlement.[163] The Settlement avoids the risks for customers that a full litigation of the matter would result in less favorable terms than the Settlement.

First, the Settlement requires SCE to remove Base Plant from rate base as of February 1, 2012, even though some of those assets continue to be used and useful. This is markedly more favorable to customers than SCE's litigation position and Commission precedent. SCE presented testimony in Phase 2 demonstrating that 23% of remaining SONGS assets were still operational at that time because SCE needed these assets to fulfill its regulatory and safety obligations. As one example, SCE explained that it was required to maintain and operate spent fuel pools and related equipment to keep its spent nuclear fuel cool to avoid releasing radioactive material into the environment.[164] SCE showed that this asset, as well as other systems that remain operational at SONGS, were necessary for one or more of the following purposes: "(1) maintaining radioactive material safely and securely on site; (2) meeting standards set forth by the NRC regarding radiological safety and security at SONGS; (3) implementing the marine mitigation projects mandated by the California Coastal Commission; and (4) transitioning to the decommissioning process."[165] Because these assets were "used and useful" within the traditional meaning of this concept, SCE's position in the OII was that the assets should remain in SCE's

[163] *See* SCE-56 (Corrected) (showing a PVRR of $1.056 billion for the settlement and $1.416 billion for SCE's litigation position).

[164] SCE's Phase 2 Opening Brief at 57.

[165] *Id.* at 55-56.

authorized rate base, earning a full rate of return, until the end of their estimated useful lives or the date of their retirement from service.

SCE's position that 23% of SONGS assets were "used and useful," and should remain in rate base, is supported by Commission precedent. The Commission has consistently defined the "used and useful" principle as holding that all "utility property [that is] actually in use and providing service," or that is "provid[ing] direct and ongoing benefits," can be added to rate base and earn a full authorized rate of return.[166] The SONGS spent fuel pool and independent spent fuel storage installation, for which SCE sought rate base treatment in Phase 2, are still in service and performing their intended functions, which are generally the same functions the assets performed while SONGS was fully operational.[167] These assets allow SCE to prevent environmental hazards and otherwise meet its basic obligations as an electrical utility, which in turn allows SCE to provide reliable and cost-effective service to customers. The assets therefore meet all the criteria of the "used and useful" standard: they are in service, providing direct and ongoing benefits to customers.

Some parties to the OII have erroneously argued that none of the SONGS assets can be considered used and useful because SONGS no longer provides generation service to customers. The Commission recently rejected this exact position in litigation regarding cost recovery of a project to remove California American Water Company's San Clemente Dam. As part of their decision approving this project, the Commission found that the dam was "used and useful" even

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[166] *See, e.g.*, D.84-09-089, 16 CPUC 2d 205, at *72-*73 (1984); *accord* D.05-02-024, 2005 WL 1864904, at *5 (Ordering Paragraph 8) (July 21, 2005) (allowing water utility to include capital expenditures in rate base "once the plant additions have been completed and are being used and useful").

[167] *See* SCE's Phase 2 Opening Brief at 60-61.

though it was not providing water to ratepayers and had not done so for many years.[168] The Commission nevertheless accepted the utility's position that the dam was used and useful because it served the function of protecting the environment and downstream homeowners by preventing a flood of built-up sediment.[169] ORA applied for rehearing, arguing that the dam was not used and useful because it "has not been used to provide service since 2003."[170] The Commission denied ORA's application.[171]

Second, the Settlement requires SCE to remove Base Plant from authorized rate base as of the first day following the tube leak—February 1, 2012. This outcome is highly favorable to customers compared to SCE's position that Base Plant should remain in rate base until SCE decided to permanently retire SONGS—June 1, 2013. SCE's litigation position, if accepted, would have allowed the entire Base Plant balance to remain in rate base, earning SCE's full authorized rate of return rather than the Settlement's reduced rate of return, for an additional 16 months. This aspect of SCE's recommendation, by itself, called for rates that would have been $82 million higher than the Settlement.[172]

Had the OII been litigated to completion, it is unlikely that customers would have achieved the Settlement's outcome regarding the date on which Base Plant is removed from rate base. Section 455.5 of the Public Utilities Code ("P.U. Code") states that the Commission "may

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[168] D.12-06-040, 2012 Cal. P.U.C. LEXIS 311 (June 21, 2012).

[169] *Id*.

[170] Application for Rehearing of the Division of Ratepayer Advocates of Decision 12-06-040 at 3-4, available at http://docs.cpuc.ca.gov/PublishedDocs/EFILE/R/171731.PDF.

[171] D.13-04-014.

[172] *See* Advice Letter 3129-E at Attachment A (calculating difference between Settlement rates and amounts previously collected based on authorized rate of return on all assets from February through October 2012).

eliminate consideration of the value of any portion of any ... production facility which, after having been placed in service, remains out of service *for nine or more consecutive months*."[173] The statute thus contemplates that out-of-service power plants can remain in rate base for at least nine months following an unplanned outage. Under the Settlement, however, Base Plant is removed from rate base beginning on the first day after the outage began.

As SCE explained in its Phase 2 brief, "[t]he idea that generation assets should be removed from rate base immediately upon the commencement of a forced outage is extreme, unprecedented, and at odds with the practical realities of providing electricity service."[174] Forced outages are regular occurrences at power plants, and utilities are properly compensated for their efforts to investigate the outage and return the plant to service.[175] In accordance with this principle, SCE's proposal to remove retired SONGS assets from rate base as of June 1, 2013, would have fairly compensated the company for its efforts to work toward restart during a time when SCE reasonably believed that SONGS could return to service.

Commission precedent supports leaving a power plant in rate base for an extended period of time during outages, even if the plant is eventually shut down. ORA's witness Robert Pocta correctly testified at the evidentiary hearing on the settlement that "[a] review of many past cases reveals there's typically a lag between the time in which a generating facility ceases commercial operation when the utilities continue to earn full return on investment and the date when the facility is removed from ratebase by the Commission and the utilities no longer earn a full

[173] (Emphasis added).

[174] SCE's Phase 2 Opening Brief at 18.

[175] *Id.*; SCE-40 at p. 13, lines 4-6.

return."[176] For example, the Commission allowed SCE's coal generation plant at Mohave and PG&E's nuclear power plant at Humboldt Bay each to remain in rate base, earning the utilities' full authorized return, for years after they closed.[177] In its decision approving the Settlement, the Commission explained that its decision to allow PG&E to leave the Humboldt Bay investment in rate base for years "was due, in part, to the fact the utility was trying to determine whether it could restart the unit."[178] For this reason, the Humboldt Bay precedent directly supports SCE's position that Base Plant should have remained in rate base until it became clear, in June 2013, that SONGS would not restart.

As ORA's witness stated at the Commission's evidentiary hearing regarding the settlement, "the timing of when [Base Plant gets removed from rate base] is a very important factor on the impact on ratepayers. The settlement terms on this issue are the most optimal for ratepayers that could be achieved through litigation."[179] Indeed, the Settlement's provision requiring removal from rate base on February 1, 2012, is even more favorable to customers than the litigation positions of TURN, ORA, and A4NR, all of whom recommended that retired SONGS assets remain in rate base for nine additional months—until November 1, 2012.[180]

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[176] ORA, Pocta, Tr. p. 2675, lines 6-13.

[177] D.12-11-051; D.85-08-046.

[178] D.14-11-040 at 77.

[179] ORA, Pocta, Tr. p. 2675, lines 23-28.

[180] A4NR's Phase 2 Opening Brief at 24; Opening Brief of The Utility Reform Network on Phase 2 Issues at 6 (Nov. 22, 2013) ("TURN Phase 2 Opening Brief"); Opening Brief of the Office of Ratepayer Advocates on Phase 2 Issues at 3 (Nov. 22, 2013) ("ORA Phase 2 Opening Brief"); *see also* ORA, Logan, Tr. p. 2559, lines 4-21 (Q: "Okay. So I take what you're saying to mean that you do not think that a plant should be removed from rate base the minute that it stops operating in a forced outage?" A: "That is not my policy recommendation, correct.").

Third, under the Settlement, SCE must accept a rate of return for Base Plant that is significantly reduced from the return SCE sought in the OII, and even further reduced from SCE's full authorized return on assets in rate base. If SCE's litigation position in Phase 2 had prevailed, SCE would have received its full authorized rate of return (7.9%) on the 23% of assets that remain "used and useful" at SONGS, and a debt-level rate of return (5.4%) on the remaining 77% of Base Plant assets.[181] Under the Settlement, however, the entire Base Plant balance earns a rate of return of only 2.62%.[182] Furthermore, the Settlement requires SCE to amortize Base Plant over a ten-year period, rather than the accelerated five-year amortization period for which SCE advocated in the OII. This extension of the amortization period has the direct effect of lowering SCE's PVRR for Base Plant, which means that customers pay less to SCE over time.

As ORA's witness Robert Pocta explained at the evidentiary hearing regarding the settlement, the Settlement's provisions on the rate of return and amortization period for Base Plant are "exceptionally beneficial to ratepayers" and "an optimal resolution of the issue for ratepayers."[183] In addition to being a significant departure from SCE's litigation position on these issues, the Settlement's rate of return and amortization period provisions, taken together, provide customers with an outcome that is even more favorable than the outcomes in prior Commission decisions. For example, when SCE and PG&E replaced their electromechanical meters with new meters, the Commission allowed both utilities to collect a return of approximately 6.5% on the utilities' net investment in their retired meters, over an amortization

[181] SCE-56 (Corrected).

[182] *Id.*

[183] ORA, Pocta, Tr. p. 2674, lines 15-17, p. 2675, lines 4-5.

period of six years.[184] When Golden State Water Company retired the Hill Street facility, the Commission authorized the utility to amortize the retired assets over a six-year period, at a rate of return equal to the utility's incremental cost of debt.[185] All three of these precedents are less favorable to customers on both metrics: the rate of return and the amortization period.

Even Commission precedents authorizing a *zero* rate of return on retired plant assets tend to be less favorable to customers, overall, than the Settlement's provisions on rate of return and amortization period. This is because the Commission precedents authorizing a rate of return of 0% tend to allow an amortization period shorter than ten years.[186] As TURN's witness William Marcus explained:

> The use of this ten-year amortization period with a low rate of return actually results in a lower present value of cost to ratepayers by significant amounts of money and greater near-term rate refunds than if we had given them no rate of return and an amortization period of five or six years. I ran some numbers to that effect, and the Settling Parties also took a look at those issues. So that is a key benefit.[187]

ORA's witness Robert Pocta similarly testified that "the ten-year amortization at the low return is comparable to a shorter amortization with no return depending on how one would value ratepayers' time value of money."[188]

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[184] *See* D.12-11-051 at 650; D.11-05-018 at 87.

[185] *See* D.11-09-017 at 13.

[186] *See, e.g.*, D.85-08-046 (allowing PG&E to amortize its net investment in Humboldt Bay over a four-year period); D.12-11-051 at 653 ("Therefore, the Commission finds reasonable and adopts TURN's recommendation that SCE be allowed to recover its remaining net investment in plant and decommissioning costs [for the retired Mohave Generating Station] over six years of remaining life, and to earn no return on plant investment.").

[187] TURN, Marcus, Tr. p. 2680, lines 8-17.

[188] ORA, Pocta, Tr. p. 2677, lines 15-19.

In sum, SCE put forward strong litigation positions regarding ratemaking for "used and useful" assets at SONGS; the timing of removal of retired assets from rate base; and the rate of return and amortization period for retired assets. These litigation positions are supported by Commission precedent, sound ratemaking principles, and, at times, SCE's adversaries in the OII. SCE's compromise on these issues demonstrates that the Settlement's Base Plant provisions are reasonable and favorable to customers in light of the record.

3. Construction Work in Progress

The Settlement permits SCE to recover its CWIP balance as a regulatory asset, but does not allow recovery of those portions of CWIP that were associated with the SGRP. SCE is also required to accept a reduced AFUDC on this balance and must amortize the regulatory asset under the same terms as Base Plant. The Settlement's CWIP provisions are reasonable in light of the record and favorable to customers relative to the parties' litigation positions and Commission precedent.

As explained above with respect to Base Plant, capital expenditures on utility projects do not enter a utility's authorized rate base until the project enters service and becomes "used and useful" to customers. While a project is still under construction, the costs of the project are recorded as CWIP. These CWIP balances earn AFUDC, which is essentially a rate of return that is accrued on the utility's books as earnings but is generally not immediately recovered from customers. When the project enters service, the accumulated AFUDC is added to the CWIP balance and the resulting sum is moved into rate base, where it earns the utility's full authorized rate of return.

SCE had a number of SONGS-related construction projects underway when the outages began in early 2012. SCE explained in its Phase 2 Opening Brief that this was typical for SONGS, as the prudent operation of complex assets requires "diverse upgrades and repairs to

maintain the plant in an operating condition."[189] Pursuant to SCE's usual practice, the costs of these construction projects were recorded as CWIP and accumulated SCE's authorized AFUDC rate. Some of these construction projects became unnecessary when SONGS was permanently retired, and these projects were therefore cancelled. The CWIP balance associated with these projects is referred to as "Cancelled CWIP" in the Settlement. Other projects remained necessary at SONGS to support ongoing operations even after the plant was retired, or to support decommissioning in the future, and those projects were not cancelled. The CWIP balance associated with those projects is referred to as "Completed CWIP" in the Settlement.

Although the Settlement allows SCE to recover its entire CWIP balance (both "Cancelled CWIP" and "Completed CWIP"), it provides a reduced AFUDC rate on this balance. Furthermore, SCE must amortize this CWIP balance under the same guidelines as Base Plant—across an extended amortization period, at a reduced rate of return. CWIP associated with the SGRP is excluded from cost recovery under the Settlement.

The Settlement's CWIP provisions are more favorable to customers than SCE's litigation position. SCE sought full recovery of the Cancelled CWIP balance, plus AFUDC at authorized rates, to be amortized over five years, beginning June 1, 2013, at a 5.54% rate of return. SCE's litigation position would have included RSG-related CWIP in the Cancelled CWIP balance. For Completed CWIP, SCE argued that ratemaking should be unaffected by the outages: the capital should remain in CWIP until the project is placed into service, at which point it would be added to rate base, where it would earn SCE's full authorized return.

SCE's litigation position on CWIP is good policy, is supported by Commission precedent, and could have been adopted in the OII absent the Settlement. Many of the CWIP

[189] SCE's Opening Brief on Phase 2 Issues at 39.

projects at SONGS had already been approved as reasonable by the Commission in past General Rate Cases, where the Commission conducts a reasonableness review of proposed projects on a forecasted basis. (Others were emergent projects that would have been included in subsequent General Rate Cases and reviewed for reasonableness on a hindsight basis.) For example, the three projects in CWIP with the largest capital investments—the Unit 2 reactor vessel head, high pressure turbine, and rapid refueling modifications—were all approved as reasonable in SCE's 2009 and 2012 General Rate Cases.[190]

Furthermore, many of the projects were essentially completed when the forced outages began, but had not yet entered service because nuclear plant operators must wait for scheduled refueling outages to implement new projects.[191] No party has alleged that any particular Cancelled CWIP project was imprudent, and there is thus no justification for disallowing these costs. SCE's litigation position recognized that the Cancelled CWIP balance should earn a reduced rate of return (similar to SCE's position on retired Base Plant assets), but also argued that disallowing recovery altogether would be "arbitrary and unfair," as there is no reason to distinguish this balance from other prematurely retired assets.[192]

Completed CWIP projects are "used and useful" to the same extent as other currently-operational SONGS assets. Under Commission precedent and traditional ratemaking, such assets should be added to rate base and earn a full authorized rate of return. For example, SCE applied to the Commission for cost recovery of capital expenditures made after Mohave was shut

[190] D.12-11-051; D.09-03-025. The Commission approved the forecast of SONGS projects through the beginning of the outage in the 2012 GRC decision, with an opportunity to recover subsequent amounts in a later application. *See* D.12-11-051 at 821-22 (Conclusions of Law 11 & 20).

[191] SCE's Phase 2 Opening Brief at 39.

[192] *Id.* at 43.

down, which SCE had incurred to maintain the plant and preserve its options regarding restart and sale.[193] The Commission allowed SCE to add this balance to rate base, including all accrued AFUDC, where this balance would earn SCE's full authorized rate of return.[194] When SCE permanently retired SONGS Unit 1 and signed a settlement agreement that allowed SCE to recover its CWIP balance, the Commission deemed that settlement reasonable.

ORA's and TURN's positions on CWIP are difficult to compare to the Settlement, as neither of these parties analyzed CWIP according to the Settlement's breakdown of Completed CWIP and Cancelled CWIP. There are, however, some parallels between each of ORA's and TURN's positions, on the one hand, and the Settlement's CWIP provisions, on the other hand. For example, ORA recommended allowing SCE to recover all Completed CWIP that entered service before November 1, 2012, which the settlement allows.[195] ORA recommended a disallowance of all CWIP after that date,[196] a position which overlaps with the Settlement's provision disallowing CWIP associated with the SGRP. TURN would have generally permitted CWIP recovery with a reduced AFUDC rate—a position embraced by the Settlement—but also recommended a "rebuttable presumption" of a disallowance for projects that were undertaken after the outages began and that were not needed for safe operation of the plant.[197] TURN did

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[193] *See* D.13-11-005 at 62, 2013 WL 6327714 (Cal. P.U.C. Nov. 14, 2013).

[194] *See id.* at 71 ("ORA takes no issue with the cost of the capital expenditures, but argues that because the plant was no longer used and useful these capital additions should not be placed in rate base, nor accrue AFUDC after January 1, 2007. For the reasons discussed above, we disagree with ORA's reasoning. We find that the capital expenditures ... are reasonable and recoverable.").

[195] ORA Phase 2 Opening Brief at 17-18.

[196] *Id.*

[197] TURN Phase 2 Opening Brief at 22-23.

not quantify the latter category, and SCE's position was that all CWIP was needed for safe plant operations and was otherwise prudent.

In the decision approving the settlement, the Commission agreed that the Settlement's CWIP provisions are reasonable. The Commission stated that its rules "do[] not wield a ratepayer hatchet to ... projects at the moment a unit goes offline," and found that "it is not unjust or unreasonable, *per se*, for the settlement to provide limited rate recovery of CWIP investment."[198] The Commission also determined that it was "reasonable that the Utilities continued to make CWIP investments after the outage began to meet safety and regulatory requirements," and concluded that "the proposed outcome is in the range of possible outcomes based on the record."[199]

4. Nuclear Fuel and Materials and Supplies Inventories

The Settlement permits SCE to recover its entire net investments in nuclear fuel and M&S. For M&S, the Settlement provides that SCE must amortize the investment in the same way as Base Plant: over a ten-year period at a reduced rate of return.[200] Nuclear fuel must also be amortized over a ten-year period and earns a rate of return equal to the floating rate for commercial paper.[201] To the extent SCE sells M&S or nuclear fuel, the Settlement provides that 95% of the net recovery shall be credited back to customers, while SCE may retain 5% of the

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[198] D.14-11-040 at 74-75.

[199] *Id.* at 94.

[200] Joint Motion of Southern California Edison Company (U 338-E), San Diego Gas & Electric Company (U 902-E), The Utility Reform Network, the Office of Ratepayer Advocates, Friends of the Earth, and the Coalition of California Utility Employees for Adoption for Adoption of Settlement Agreement at 28 (Apr. 3, 2014) ("Joint Motion for Adoption of the Settlement Agreement").

[201] *Id.* at 28, 30.

recovery as an incentive to maximize the sale proceeds.[202] To incentivize SCE to cancel its outstanding obligations to purchase additional fuel, the Settlement also provides that 5% of the difference between the outstanding obligations and the costs that SCE incurs to cancel the fuel contracts will be added to the regulatory asset for nuclear fuel and recovered by SCE.[203] These provisions are more favorable to customers than SCE's litigation positions and consistent with Commission precedent.

As an initial matter, full recovery of SCE's investments in its nuclear fuel and M&S inventories is a reasonable outcome that was not substantially contested by SCE's adversaries in the OII. These investments were prudently incurred and unavoidable given SCE's responsibilities as a nuclear power plant operator. As SCE explained in its Phase 2 Opening Brief, the M&S inventory mostly consisted of "'tools and components'" that are necessary for SCE to "perform routine maintenance and quickly and effectively replace components that fail unexpectedly."[204] As the operator of SONGS, SCE was also required to procure nuclear fuel. Due to the various phases of processing required to mine, enrich, and convert uranium into nuclear fuel, SCE had to procure the fuel significantly in advance of the time it was needed at SONGS.[205] This resulted in SCE owning an inventory of unused nuclear fuel. Because the M&S and nuclear fuel inventories were necessary costs of service and prudently incurred, traditional cost-of-service principles dictate that SCE should be permitted to recover these costs through rates.[206]

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[202] *Id.* at 30.

[203] *Id.*

[204] SCE's Phase 2 Opening Brief at 48.

[205] *Id.* at 51.

[206] SCE-40 at p. 12, lines 12-21.

Neither TURN nor ORA contested SCE's ability to recover its original investment in the nuclear fuel or M&S inventories.[207] Instead, TURN's and ORA's litigation positions each blended recommendations for SCE to recover certain portions of these investments (at reduced or zero rates of return) with recommendations for the Commission to defer its cost recovery determination on these inventories.[208] The Settlement's provisions, which allow full cost recovery at a reduced rate of return and over an extended amortization period, are not inconsistent with TURN's and ORA's recommendations.

Furthermore, the Settlement's provisions represent another concession by SCE. For M&S, SCE had advocated to leave the investment in rate base (where it would earn SCE's full authorized rate of return) until 2015, at which point the investment would be amortized over a five-year period at a reduced rate of return of 5.54%.[209] For fuel, SCE recommended full cost recovery of the unsold portion of nuclear fuel, and recommended that SCE earn a return at "the cost of five-year debt, fixed as of the rate on June 1, 2013."[210] The Settlement's provisions regarding the amortization period and rate of return on these investments are more favorable to customers than the ratemaking suggested by SCE's litigation position. This compromise

[207] Some intervenors advocated for a disallowance of a portion of the nuclear fuel inventory based on their allegation that SCE imprudently loaded the fuel into Unit 2 during its scheduled refueling outage in early 2012, supposedly rendering it unsalable. TURN's litigation position advocated for the Commission to disallow these costs if the Commission determined in Phase 3 that the fuel was imprudently loaded into the reactor. TURN-15, pages 7-8. The Commission held, however, that "the Phase 1 evidence established that refueling occurred during the scheduled outage, after initial U2 inspections and repairs, and before SCE had sufficient evidence to delay placing fuel in the reactor of U2." D.14-11-040 at 95. The Phase 1 PD also concluded that "SCE's decision to place new fuel in the U2 core was reasonable." PD at 75. It subsequently developed that SCE was able to reprocess the fuel that was loaded into Unit 2 and will market such fuel for sale.

[208] TURN-15, pages 7-8; DRA-3, pages 2, 14-15.

[209] SCE's Phase 2 Opening Brief at 50.

[210] *Id.* at 53-54.

demonstrates that the Settlement's fuel and M&S provisions are reasonable in light of the record, as the Commission held in its decision approving the agreement.[211]

The Settlement's incentive provisions on nuclear fuel and M&S are also advantageous to customers. These provisions encourage SCE to maximize the sale proceeds, thereby reducing customers' cost responsibility. These provisions were originally proposed by TURN in the OII,[212] and the Commission held that these provisions "are a reasonable approach to prod SCE to maximize revenue which favors ratepayers."[213] Indeed, the provisions are already serving their intended purpose of minimizing customers' rate responsibility. As explained in SCE's Summary of Settlement Agreement Implementation, SCE has already credited $6 million back to customers for their portion of the proceeds of M&S sales.[214]

5. Operations and Maintenance Costs

The Settlement allows SCE to recover authorized O&M and non-O&M expenses for 2012, but does not allow SCE to recover SGIR costs that exceed the provisionally-authorized revenue requirement for O&M in 2012. The Settlement further allows SCE to recover recorded O&M and non-O&M expenses for 2013, provided that those costs do not exceed the revenue requirement provisionally authorized for O&M in the 2012 General Rate Case. This outcome is reasonable in light of the record and consistent with Commission precedent.

SCE's authorized O&M levels are prescribed by the Commission in SCE's General Rate Cases, which take place every three years. In each General Rate Case, the Commission reviews

[211] D.14-11-040 at 94, 96.

[212] TURN-15, pages 7-8.

[213] D.14-11-040 at 96.

[214] Summary of Settlement Agreement Implementation at 26, 30.

SCE's proposals for the following three years and makes a determination, on a forecasted basis, as to a reasonable amount of O&M to authorize for each upcoming year.

Because traditional, routine ratemaking allows recovery of an authorized forecast of O&M, the Settlement's provisions allowing SCE to recover its authorized O&M balance are reasonable. The Settlement's effective disallowance of SGIR is favorable for customers because it reflects shareholder responsibility for the RSG failures, despite the fact that SCE acted reasonably in responding to the outage. In its decision approving the Settlement, the Commission stated, "[a] reasonable plant operator would take steps after a leak such as the one in U3, to try to figure out what went wrong and try to fix it and restore generation. At some point this becomes unreasonable or cost-inefficient. Thus, the Agreement's disallowance and refund of about 2/3 of the SGIR costs is reasonable."[215] As such, the Settlement's provisions regarding O&M are reasonable.

6. Replacement Power

Under the Settlement, customers pay for the power they actually consumed. This result is fair, consistent with precedent, and is the best outcome customers could have hoped for in light of the Settlement's provisions removing Base Plant from rate base, and effectively disallowing the entire net RSG balance, as of the first day after the tube leak. The Settlement does not specify the amount customers will pay for power purchased by the Utilities; instead, the Settlement provides that the Settling Parties cannot challenge rate recovery of any power purchases on the basis that those purchases represent replacement power costs for SONGS.

The Settling Parties agreed that a "foundational premise of the settlement" was that, "since the Base Plant is removed from rates the day after the outages began, there are no

[215] D.14-11-040 at 89.

replacement power costs being incurred during a period when the Base Plant remains in rates."[216] In other words, a utility's power purchases can only be considered "replacement power" when the utility makes those purchases to replace the output of a facility that remains in rate base. Once a power plant is permanently retired and removed from rate base, the utility's power purchases are not "replacement power" anymore—they are simply part of the portfolio of purchases the utility makes to meet its customers' needs. Such power purchases are recoverable through rates, subject to the Commission's review in the utilities' Energy Resource Recovery Account ("ERRA") proceedings. Under the Settlement, SONGS was effectively retired for ratemaking purposes on February 1, 2012. It is thus reasonable that power purchases after that date should be recoverable through SCE's ERRA proceedings, and not subject to any disallowance as a result of the SONGS outages.

SCE is not aware of any precedent in which the Commission has imposed a disallowance of market power costs during a time period when the relevant power plant was removed from rate base. There is, however, Commission precedent suggesting that such a remedy would be inappropriate because it is tantamount to a penalty. In an interim decision in the Palo Verde OII, the Commission explained that the utility bears the burden of proof with respect to issues that go toward restitution; to this end, it is typically the utility's burden to prove that replacement power costs were incurred prudently during an outage.[217] But when intervenor parties seek a remedy that goes beyond restitution and is more properly characterized as a "penalty" or a "punitive action," the Commission explained, the intervenor carries the burden of proof to demonstrate that

[216] Reply Comments of Southern California Edison Company (U 338-E), San Diego Gas & Electric Company (U 902-E), The Utility Reform Network, the Office of Ratepayer Advocates, Friends of the Earth, and the Coalition of California Utility Employees on the Proposed Decision at 1-2 (Nov. 3, 2014).

[217] D.93-05-013, 49 CPUC 2d 218, at *6 (1993).

such a remedy is warranted.[218] The Commission categorized removal from rate base as a penalty, for which the intervenor would carry the burden of proof, because such a remedy would "amount to more than restitution" when combined with a replacement power disallowance.[219] There is no basis in precedent or the record for such a penalty against SCE.

The Settlement's outcome on replacement power is consistent with ORA's and TURN's litigation positions. ORA's Phase 2 testimony acknowledged that, "[w]ith the permanent shutdown of SONGS 2 & 3, SCE and SDG&E are no longer buying or generating 'replacement' power for SONGS, they are now replacing the lost generation from SONGS."[220] Likewise, TURN's litigation position was that replacement power should be disallowed only during the time period that SONGS remained in rate base;[221] because the Settlement removes SONGS from rate base as of February 1, 2012, TURN's litigation position is consistent with the Settlement.

If the OII had been litigated, it is unlikely that the Commission would have deviated from the principle that a utility's exposure to replacement power disallowance ends when the plant is retired and removed from rate base, even if the Commission reached the conclusion that SCE was imprudent in respect to the outage.

7. Litigation Recovery Sharing

The Settlement provides for SCE and its customers to share any recoveries from Mitsubishi and NEIL. Recoveries from Mitsubishi (after deducting litigation costs) are shared 50/50 between customers and SCE, whereas 95% of NEIL recoveries under the Outage Policy

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[218] *Id.*

[219] *Id.* at *12-*13.

[220] DRA-3, page 11, lines 5-7.

[221] Reply Testimony of Kevin Woodruff on Behalf of the Utility Reform Network Addressing Replacement Power Costs Incurred in 2012 Due to Outages at San Onofre Nuclear Generating Station (Phase 1) at 2 (July 10, 2013).

(after deducting litigation costs) are refunded to customers. These provisions are highly favorable to customers.

Because customers bear the responsibility under the Settlement of paying for the power purchases that form the basis of SCE's claims against NEIL, it is fair and appropriate for customers to receive the lion's share of NEIL recoveries. Nevertheless, the Settlement's allocation of 95% of net recoveries to customers is very favorable to customers. In Phase 2, TURN's witness William Marcus recommended that customers receive only 90% of NEIL recoveries, assuming that customers bear all replacement power costs.[222] As Mr. Marcus recognized, SCE should be allowed to retain a portion of the NEIL recovery to create an incentive for SCE to maximize such recoveries. While the Settlement reduces that incentive below 17.5% (as the parties agreed in the initial settlement), and below the 10% that Mr. Marcus recommended, it still allows SCE to retain 5%. In fact, SCE achieved a favorable settlement against NEIL, which resulted in a $293 million credit to SCE's customers effective January 1, 2016.[223]

Likewise, because SCE shareholders bear significant costs (foregone returns, SGRP investment, 2012 SGIR costs), SCE should be allowed to retain a significant portion of the proceeds of its litigation against Mitsubishi, which is based on the RSG failures. In fact, because SCE bears the entire capital cost of the failed RSGs under the Settlement, SCE should arguably have retained a majority of the Mitsubishi recoveries until it had been compensated for that amount. In the OII, TURN's witness William Marcus took the position that recoveries from Mitsubishi "should follow the allocation of steam generator and plant costs between ratepayers

[222] TURN-15, page 12.

[223] Summary of Settlement Implementation at 29-30.

and shareholders."[224] Mr. Marcus gave the following explanation and example to illuminate his proposal for how the litigation recoveries could be apportioned according to the allocation of responsibility for RSG and Base Plant costs:

> If TURN's position is adopted that no ratepayer funding should be provided for the steam generators, Edison should receive 90% and ratepayers 10% of any recoveries *until the book value of the steam generators as of January 30, 2012 is recovered*. After the book value has been recovered, any proceeds should be split based on the allocation of remaining plant costs .... For example . . . if there is recovery of plant costs with zero return over the life of the license, 71% of costs are assigned to ratepayers and 29% are assigned to shareholders. If this treatment is adopted, then 71% of litigation proceeds (in excess of the steam generator book value) should be assigned to ratepayers and 29% to shareholders.[225]

SCE agrees that Mr. Marcus's position would have been an equitable way to allocate the litigation proceeds. In fact, the original settlement executed by the Settling Parties closely tracked Mr. Marcus's proposal. For the first $100 million in net recoveries, SCE would retain 85% and refund 15% to customers. For the next $800 million, SCE would retain 66.67% and refund the remainder to customers. Any net recoveries thereafter would be shared 25% to SCE and 75% to customers. Under this tiered system, SCE would have retained $618 million of the first $900 million of net recoveries (approximately 69%), which is less than the sum of the SGIR costs and the book value of the RSGs that SCE agreed to absorb. The Settlement's apportionment of 50% of the Mitsubishi proceeds to SCE is thus reasonable and favorable to customers.

[224] TURN-15, page 12.

[225] *Id.* pages 12-13 (emphasis added).

B. The Settlement Is Lawful

The Settlement complies with all applicable statutes and prior Commission decisions. In their Joint Motion for Approval of the Settlement Agreement, the Settling Parties represented that they had each "considered relevant statutes and Commission decisions and determined that the Agreement is fully consistent with those statutes and prior Commission decisions."[226] In its decision adopting the Settlement, the Commission carefully considered and rejected various arguments set forth by intervenors that the agreement contravened Commission law, ultimately finding that "the terms of the Agreement are not inconsistent with the applicable statutes (e.g., § 451, § 455.5), rules, and prior Commission decisions."[227]

In particular, the Commission found that the Settlement complies with Section 455.5 of the P.U. Code. Although Section 455.5 does not require the Commission to remove an out-of-service facility from rates, the statute states that the Commission, when establishing rates, "may eliminate consideration of the value of any portion of any electric ... facility which, after having been placed in service, remains out of service for nine or more consecutive months, and may disallow any expenses related to that facility." The Settlement is consistent with Section 455.5: it eliminates rate recovery of the SGRP, removes all of SONGS from SCE's authorized rate base, and disallows certain expenses and costs associated with SONGS. In reaching these conclusions, the Commission noted that the statute is "not mandatory" and that, in any event, "the proposed exclusions from rate base and reduced returns ... are consistent with the requirements of §455.5."[228]

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[226] Joint Motion for Adoption of the Settlement Agreement at 39.

[227] D.14-11-040 at 70.

[228] *Id.* at 75.

The Commission also found that the Settlement complies with Section 451 of the P.U. Code, which provides that utility rates "shall be just and reasonable." The reasonableness of the ratemaking proposal set forth in the Settlement is evident from the PVRR analysis set forth in SCE-56 (Corrected); the arguments described in this brief and the Settling Parties' Joint Motion for Adoption of the Settlement Agreement; and the Commission's thorough analysis in its decision approving the Settlement. The Commission specifically rejected arguments set forth by A4NR that the Settlement violates Section 451 because it allows rate recovery of assets that A4NR contends were not "used and useful."[229] The Commission explained that Section 451 does not include the concept of "used and useful" and does not require the Commission to immediately disallow costs during unplanned outages, which "may result in the need for longer-term activities which impact the health and safety of the public."[230]

The Commission also rejected arguments from some intervenors that the Settlement contravenes P.U. Code Section 463(a), which requires the Commission to "disallow expenses reflecting the direct or indirect costs resulting from any unreasonable error or omission relating to the planning, construction, or operation of any portion of the corporation's plant which cost, or is estimated to have cost, more than fifty million dollars ($50,000,000)."[231] The Commission correctly noted that, "[d]espite the persistent allegations of the non-settling parties, the record does not establish that SCE made an unreasonable error or omission' that resulted in certain expenses."[232] Section 463(a) is thus inapplicable to the Settlement.

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[229] *Id.* at 73-76.

[230] *Id.*

[231] *Id.*

[232] *Id.*

Finally, the Commission rejected certain non-settling parties' arguments that the Settlement is unlawful because: 1) the Commission was legally required to find SCE imprudent under principles of *res ipsa loquitur*; 2) ORA's participation in the Settlement violated its duty to "obtain the lowest possible rate for service"; and 3) the Settlement was tainted by "collusion."[233] As the Commission noted, these arguments are baseless.[234]

C. Other Benefits of the Settlement

As SCE's Summary of Settlement Implementation explained, customers have already received significant benefits as a result of the Settlement's implementation. In the year and a half since the Commission approved the Settlement, SCE has reduced ongoing rates, and has refunded, or will refund, nearly $1.6 billion under the agreement.[235] These rate reductions resulted in part from the Settlement's provisions requiring SCE to credit customer rates by the amount of costs that were disallowed by the Settlement, such as SGRP capital costs, SGIR expenses, and large portions of shareholders' return on Base Plant and other capital investments.[236] The reductions also resulted in part from SCE's recovery from NEIL, which was credited 95% to customers (after deducting litigation costs).[237] The rate credits implemented over the last 18 months was significantly larger than the Settling Parties originally estimated, as a result of recoveries from third parties and other cost offsets that were not accounted for in the

[233] *Id.*

[234] The Commission also correctly found that the procedural requirements of Rule 12 had been met. *Id*. at 61-69.

[235] Summary of Settlement Implementation at 10.

[236] *Id.* at 11.

[237] *Id.* at 12.

PVRR analysis that the Settling Parties presented to the Commission along with their Motion for Adoption of the Settlement Agreement.[238]

This $1.6 billion estimate of rate reductions does not account for other potential factors that could reduce customers' rates in the future. For example, SCE is vigorously pursuing damages from Mitsubishi in an arbitration. SCE also intends to sell its nuclear fuel inventory, and 95% of the proceeds of such sales (net of costs) will be credited to customers under the Settlement.

Invalidating the Settlement and returning the case to a litigation posture would roll back the certainty of achieving these benefits for customers and introduce significant uncertainty regarding customers' ultimate cost responsibility for SONGS. It would also create a significant delay in customers' ability to receive rate relief as a result of the SONGS closures. As the Commission reasoned, "[i]f we were to continue with Phase 3, ratepayers might fare better or worse than proposed, but a delay of any refunds is certain. The hearings would likely be long and complex."[239] Phase 3 hearings would indeed be long and complex, as they would involve multiple, esoteric technical issues. Significant discovery would be required before the hearings, and witness testimony would be extensive and lengthy. In the meantime, Commission resources would be consumed and rates would remain higher than under the Settlement.

Rescinding the decision approving the Settlement also could create problems above and beyond the risk that customers will end up with a less favorable outcome. If the Settlement were invalidated, SCE would need to revert back to the rate levels authorized in its 2012 General Rate Case with respect to SONGS costs. These authorized rates are higher than the SONGS-related

[238] *Id.* at 10.

[239] D.14-11-040 at 112.

rates imposed by the Settlement, so the immediate impact to customers would be a rate increase. Furthermore, it is difficult to "unwind" the Settlement given the NEIL settlement and the complicated ratemaking for both bundled service and departing load customers necessitated by the settlement's implementation.

V. The Amended Settlement Agreement Was Formed Through a Process that Was Lawful and Consistent with Commission Rules

The Settlement was negotiated and approved through a process consistent with Rule 12.1(d). The settlement was not formed or agreed to in any respect in the Warsaw meeting, but instead resulted from arm's-length negotiations that were based on the positions taken in the OII. In D.15-12-016, the Commission determined that SCE's late-reporting of the Warsaw meeting and related representations to the Commission warranted the imposition of a penalty, a ruling that SCE has not challenged. That decision fully resolves the issues arising from the Warsaw meeting. Rescinding D.14-11-040 based on the Warsaw meeting would be unwarranted, inappropriate, and harmful for utility customers.

A. The Settlement Resulted from Arms'-Length Negotiations

As the Settling Parties stated when they jointly moved for approval of the settlement agreement, "[t]he Utilities, TURN, and ORA—represented by experienced CPUC practitioners—negotiated in good faith, bargained aggressively, and, ultimately compromised."[240] The Settling Parties also stated that the settlement "is a product of substantial negotiation efforts on behalf of the Utilities, TURN, and ORA" and that "the negotiated

[240] Joint Motion for Adoption of the Settlement Agreement at 36.

outcomes in the [settlement] are within the range of positions and outcomes proposed by the Settling Parties in their prepared testimony and briefing on Phases 1, 1A, and 2."[241]

ORA and TURN negotiated the settlement based on their own independent analysis of Commission precedent, the prospects of success in litigation, and the benefits of an early resolution. Both were active, fully engaged parties to the settlement negotiations, which spanned ten months and involved fourteen in-person meetings, as well as numerous telephone calls. The Commission, in approving the settlement agreement, observed:

> The parties' identities are separate and their interests distinct. We note that settlement negotiations have taken more than a year, each side relied on in-house and outside counsel to research and conduct settlement negotiations and the Agreement was reached after the parties had exchanged information, litigated three phases of the OII, and engaged in comprehensive independent discovery. The negotiation process allowed the parties a further opportunity to review the relative strengths and weaknesses of their litigation positions. Every indication is that counsel on each side adequately analyzed the risks and benefits of their clients' respective positions, and advised their clients competently.[242]

The negotiators for TURN and ORA were experienced and sophisticated, and they formed their own, independent opinions about the merits of the settlement as compared to the risks of a litigated outcome. The benefits of the settlement were apparent not only to TURN and ORA, but also to FOE and CUE, which were not involved in the settlement negotiations but, based on their own independent assessment, elected to join the settlement shortly after the parties described it at the settlement conference. And other parties, the California Large Energy Consumers Association ("CLECA"), World Business Academy ("WBA"), and the Alliance for

[241] *Id.* at 37.

[242] D.14-11-040 at 83.

Retail Energy Markets ("AReM") and Direct Access Customer Coalition ("DACC"), expressed support for the settlement agreement as well.[243]

Nothing said in the Warsaw meeting changes the fundamental fact that the settlement was negotiated in good faith by SCE and SDG&E, on the one hand, and TURN and ORA, on the other. TURN has acknowledged that, in early April 2014, within a few days after TURN signed the settlement, President Peevey told TURN's representative about the Warsaw meeting. Yet TURN continued to advocate for the Commission's approval of the settlement.[244] This fact conclusively establishes that the Warsaw meeting was irrelevant to TURN's position in the settlement negotiations. TURN confirmed this conclusion after SCE reported the Warsaw meeting, stating that it was a "good faith participant in the settlement negotiations"[245] and decided to support the settlement "based on its own independently developed litigation positions, a review of the positions put forth by all active parties, and an assessment of potential outcomes based on past Commission decisions …."[246] Similarly, after SCE reported the Warsaw meeting, ORA stated that it "believes it worked to strike a good deal for ratepayers based on legal precedents."[247]

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[243] *Id.* at 35 ("CLECA, who became a party in time to weigh in on the Agreement, offers essentially unqualified support, finding it 'reasonable and balanced between ratepayer and shareholder interests' including a reasonable 'bottom line.'"); 36 ("AReM and DACC find the Agreement to be a reasonable resolution of this proceeding and do not oppose its adoption by the Commission."); 38 ("WBA generally supports the Agreement"); 39 ("WBA believes the Agreement will resolve key issues of dispute between parties and bring a 'much needed resolution of the contested claims' when adopted in a final form.").

[244] SCE's Response to A4NR Petition, Attachment (Declaration of Henry Weissmann, attaching TURN Press Release dated Apr. 17, 2015).

[245] TURN Response at 2.

[246] *Id.* at 2-3.

[247] ORA Press Release, cited in SCE's Response to ORA Petition at 16 n.62 ("ORA Press Release").

The settlement negotiation was based on the parties' litigation positions. For example, both the structure of the Settlement, and the outcomes it reflects, closely resemble the positions advanced in Phase 2 of the OII by TURN's witness William Marcus. In his testimony, Mr. Marcus separately addressed each of the cost categories that the settlement subsequently resolved: (1) SGRP costs; (2) investments in plant in service other than steam generators (which the settlement calls Base Plant); (3) CWIP; (4) M&S; (5) nuclear fuel; (6) O&M, including SGIR; and (7) sharing of litigation recoveries.[248] Any settlement had to address these categories, so it is neither surprising nor problematic that the Warsaw meeting touched on these topics, though in significantly less detail (for example, the notes from the Warsaw meeting do not specifically mention CWIP, M&S, SGIR, or nuclear fuel). In addition, as summarized above, Mr. Marcus recommended ratemaking for each of these categories that was very similar to the settlement: as Mr. Marcus testified, the settlement "is quite close to our original litigation position and that of ORA."[249] A comparison of Mr. Marcus's Phase 2 testimony and the settlement agreement makes clear that the settlement was the result of a negotiation between the parties that was based on the parties' litigation positions.

Any suggestion that the settlement agreement was actually reached in the Warsaw meeting is simply false. Edward Randolph's declaration states, in response to a question about whether Mr. Pickett made any statements which led Mr. Randolph to believe that Mr. Pickett and President Peevey had reached an agreement, "No. Mr. Pickett made clear that he did not have authority to make an agreement on a SONGS settlement."[250] Any contrary suggestion would fly

[248] *See generally* TURN-15, Marcus.

[249] TURN, Marcus, Tr. p. 2679, lines 12-13.

[250] ALJ's Ruling on Sanctions Appendix A at 2.

in the face of the statements by TURN, ORA, SCE, and SDG&E that they negotiated the settlement at arms'-length.

Likewise, any suggestion that TURN and ORA could have negotiated a better settlement had they known about the Warsaw meeting is unsupported and illogical. TURN admits that "it is not clear whether the outcome for ratepayers would have been materially different" had the Warsaw meeting been disclosed.[251] This concession by one of the settlement's principal negotiators completely negates any claim that the settlement negotiation was adversely affected by the late disclosure of the Warsaw meeting.

Nor did any of the other seven communications that the Commission found were reportable[252] affect the integrity of the settlement negotiation process or its results. Two of those communications occurred *after* the settlement agreement was negotiated; these were President Peevey's efforts to convince SCE to modify the settlement to add a provision to fund greenhouse gas research at the University of California ("UC")—efforts that SCE rebuffed.[253] The UC funding provisions were not the product of the parties' negotiation, but resulted from the September 5, 2014 Ruling. The other five communications touched on matters that the Commission concluded were within the scope of the OII, but none of those communications addressed settlement and none affected the settlement negotiations.[254]

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[251] TURN Response at 2.

[252] D.15-12-016 at 14-25.

[253] *See id*. at 26-27.

[254] *Id*. at 14-15 (March 27, 2013, discussion between President Peevey and Mr. Pickett regarding "substantive issues associated with potential allocation of some costs to be determined in the SONGS OII"), 16 (May 28, 2013, email attaching press release discussing reasonableness of SCE's conduct related to the design of the RSGs), 17-18 (June 26, 2013, communication providing an update on status of bargaining efforts with respect to severance of SONGS employees), 19 (September 6, 2013, communication that there would be a combination of
(footnote continued)

B. The Commission Followed a Lawful Process for Evaluating the Settlement.

The Commission approved the Settlement only after a thorough, public process that spanned seven months. This process included the ALJs directing the Settling Parties to make documents and additional testimony available,[255] the convening of an evidentiary hearing during which representatives of the Settling Parties testified and were cross-examined,[256] a series of comments and reply comments by parties on the motion for settlement approval,[257] and a community information meeting engineered to provide the public with a direct opportunity to comment on the settlement.[258] The process culminated with a ruling issued by the Assigned Commissioner and ALJs requesting changes to the settlement agreement in order to meet the public interest; these requested changes were then accepted by the Settling Parties and incorporated in the Settlement.[259] The full Commission then heard oral argument on the proposed decision approving the Settlement and voted unanimously to approve it pursuant to Rule 12.1(d).[260]

This extensive process, and the numerous opportunities for public comment throughout, established a record for the Commission to consider the merits of the settlement. D.14-11-040

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disallowances of capital investment and replacement power costs, and that the delay of the ERRA decision put SCE in a difficult financial situation), 20-22 (November 15, 2013, communication regarding efforts to bring MHI to negotiating table and to obtain support from federal officials).

[255] D.14-11-040 at 19.

[256] *Id.* at 20 (the May 14, 2014 hearing).

[257] *Id*.

[258] *Id.* at 19-20 (the June 16, 2014 meeting).

[259] *Id.* at 20 (noting that non-settling parties also filed comments on the proposed changes).

[260] *Id.* at 130.

does not rely on anything that occurred in the Warsaw meeting. As such, the Warsaw meeting does not undermine the validity of the Commission's process or decision.[261]

VI. The University of California Contribution

The SCE shareholder contribution to greenhouse gas research at the University of California ("GHG contribution") was added to the Settlement at the request of the Assigned Commissioner and ALJs.[262] Specifically, the Assigned Commissioner and Administrative Law Judges' Ruling requested that "the Settling Parties add a provision to the Agreement which will result in a multi-year project, undertaken by the University of California, funded by shareholder dollars …."[263] The ruling went on to specify with whom the Utilities would work to create the program (the University of California Energy Institute or other existing UC entity, on one or more campuses, engaged in energy technology development); the length of time the program would operate (five years); the amount of shareholder money required to annually fund the program ($5 million annually for SCE and SDG&E combined); and the process by which a Program Implementation Plan would be created and submitted to the Commission (via a specified meeting within 60 days and through a Tier 2 Advice Letter).[264]

At the request of the Assigned Commissioner and ALJs, the Settling Parties incorporated the GHG contribution into the Settlement approved by D.14-11-040.[265] SCE believes that GHG contribution is consistent with Rule 12.1(d), and that the communications described in the Late-Filed Notice of Ex Parte Communications filed by UCLA on December 15, 2015, do not

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[261] *See* D.03-04-038, 2003 WL 1916685 (Cal. P.U.C. Apr. 3, 2003).

[262] September 5, 2014 Ruling at 8-9.

[263] *Id.* at 9.

[264] *Id.* at 10.

[265] D.14-11-040 at 120-21.

undermine that conclusion. But since the GHG contribution provision was requested by a Commission ruling, SCE leaves it to the Commission's discretion to determine whether to allow that provision to remain in place. If the Commission concludes that the GHG contribution provisions of the Settlement should be cut back or eliminated, the Commission would have authority to request that the Settling Parties agree to such a change while leaving the remaining provisions of the Settlement in place. With or without the GHG contribution provisions, the Settlement meets the standards of Rule 12.1(d).

VII. Conclusion

The record in the OII should be closed. D.14-11-040 should not be modified, the Settlement should remain in effect, and the Settling Parties' obligations under sections 5.1 and 5.8 of the Settlement Agreement should resume. The Commission should deny A4NR's and ORA's petitions for modification and Ruth Henricks' Application for Rehearing.

Date: July 7, 2016

Respectfully Submitted,

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